2005

Glynn F. Wayment Edward C. England v. William Howard and Lee R. Howard : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GLYNN F. WAYMENT and EDWARD C. ENGLAND,
Plaintiffs/Appellees,
v.
WILLIAM HOWARD,
Defendant,
and LEE R. HOWARD,
Defendant/Appellant.

LEE R. HOWARD,
Counterclaimant/Appellant,
v.
GLYNN F. WAYMENT and EDWARD C. ENGLAND,
Counterdefendants.

Appellant's Brief

Court of Appeals No.: 20050547

Civil No.: 010903790 WA
Judge W. Brent West

Appeal from Decisions of the Second Judicial District Court
Judge Brent West

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JURISDICTION

The Supreme Court had jurisdiction over this matter pursuant to Utah Code Annotated ("UCA") § 78-2-2(3)(j). Under UCA § 78-2-2(4), the Supreme Court has transferred the matter to the Court of Appeals, which possesses jurisdiction over matters so transferred pursuant to UCA § 78-2a-3(2)(j).

ISSUES AND STANDARDS OF REVIEW

ISSUES

I. Whether the Trial Court erred in denying Mr. Howard's two motions for summary judgment:

- **a.** By finding that there were material facts in dispute that precluded summary judgment (R. 47–53, 232–36, 306–11, 621–30);
- **b.** By concluding that *res judicata* did not bar Plaintiffs' claims (R. 53–57, 240–41);
- **c.** By concluding that Plaintiffs suffered interference with their water right, despite having always received all of the water they are entitled to, watering more land than they are entitled to, with more water than they are entitled to, at a greater rate than they are entitled to (R. 57–58, 311–19);
- **d.** By concluding, despite Plaintiffs' having suffered no damage, that their claims were not moot (R. 246, 319, 631–32).

II. Whether the Trial Court erred in its *Final Judgment* and in its *Findings of Fact and Conclusions of Law*, upon which the *Final Judgment* was based, both of which were filed on May 12, 2005:

- **a.** By finding that, historically, Plaintiffs' diversion of water regularly employed a pumping and refilling cycle (R. 1280);
- **b.** By finding that the Marriott slough has a "generally south to north

flow" (R. 1284);

c. By ruling that Lee Howard's dike interfered with Plaintiffs' water right by affecting the natural flow of the stream, despite Plaintiffs' having received sufficient water at their point of diversion to satisfy their water right (R. 1287, 1573 at 575–96);

d. By concluding that the three-acre duty on Plaintiffs' water-right certificate had been increased to four acre-feet (R. 1284–85, 1572 at 211–13);

e. By concluding that Mr. Howard withdrew his trespass claim (R. 1275, 1461);

f. By concluding that there were no grounds for Mr. Howard's nuisance claim (R. 1275–77, 1461); and

g. By concluding that there were no grounds for Mr. Howard's negligence claim (R. 1275–77, 1461).

STANDARDS OF REVIEW

As to Issues I.a, I.b, I.c, & I.d:

Because summary judgment is granted as a matter of law rather than fact, the appellate court is free to reappraise the trial court's legal conclusions, *Winegar v. Froerer Corp.,* 813 P.2d 104, 107 (Utah 1991), for correctness, without deference to the trial court, *Country Oaks Condominium Management Comm. v. Jones,* 851 P.2d 640, 641 (Utah 1993). This nondeferential standard also applies to the threshold issue of whether material issues of fact exist making summary judgment improper. *Neiderhauser Builders & Dev. Corp. v. Campbell,* 824 P.2d 1193, 1196 (Utah Ct. App.1992).

As to Issues II.a, II.b:

"A party challenging a fact finding must first marshal all record evidence that supports the challenged finding," Utah R. App. Proc. ("URAP"), Rule 24(a)(9), "and then

demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." *Chen v. Steward*, 2004 UT 82, ¶76, 100 P.3d 1177 (citation omitted).

As to Issues II.d, II.e, II.f & II.g:

A trial court's determination of questions of law is given no deference on review because the appellate court has "the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction." A reviewing court thus applies a correctness standard, deciding the matter for itself. *Drake v. Industrial Commission of Utah*, 939 P.2d 177 (Utah 1997) (*quoting State v. Pena*, 869 P.2d 932, 936 (Utah 1994)).

As to Issue II.c:

See Section III.A.3, below.

DETERMINATIVE PROVISIONS

(The text of these provisions is fully set forth in the Addendum)

Utah Code Annotated §§	73-3-1	73-3-10	73-3-16
	73-3-2	73-3-11	73-3-17
	73-3-3	73-3-12	73-3-20

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal from decisions of the Second Judicial District Court, Judge Brent West presiding, denying Lee Howard's two motions for partial summary judgment and entering final judgment against him following trial.

COURSE OF PROCEEDINGS

The trial court heard the Howards' first *Motion for Partial Summary Judgment* on

April 12, 2002, but denied it in a *Decision* filed on July 9, 2002 (copy attached at *Addendum* ("*Add.*") *Tab* F). The Howards' second *Motion for Partial Summary Judgment* came before the trial court on October 29, 2003. The trial court denied this second *Motion* in a minute entry that same date (copy attached at *Add. Tab* G); the actual *Order*, however, was not entered until November 20, 2003, several days after the close of trial (a copy of the Order is attached at *Add. Tab* H). Trial was held on November 13, 14, and 17, 2003, the trial court issuing *Decisions* on April 27 and August 23, 2004 (copies attached, respectively, at *Add. Tabs* I & L). The *Final Judgment* (*Add. Tab* K) and *Findings of Fact and Conclusions of Law* ("*FF&CL*"; separately "*FF*" and "*CL*"; *Add. Tab* J) were entered over the Howards' objections on May 12, 2005. *Notice of Appeal* was timely filed on June 8, 2005.

STATEMENT OF FACTS[1]

Lee Howard[2] owns property located in 13 of Township 6 North, Range 3 West, Salt Lake Base and Meridian, which is adjacent to property that Plaintiff Edward C. England claims to own (R. 2, 13, 65, 156).[3] England claims to own property directly adjacent to Mr. Howard's, and Glynn Wayment[4] claims to own property north of

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[1] The facts set forth in this *Statement of Facts* are for the most part those before the trial court at summary judgment. Facts adduced or elicited at trial, and those explicitly appearing in the trial court's *Findings of Fact*, are cited as footnotes below.

[2] Lee Howard's son, William Howard, was sued by the Plaintiffs for an alleged trespass that the trial court dismissed. (R. 1573 at 330.) He was not a counterclaimant and is, therefore, not an appellant in this case.

[3] Trial: R. 1573 at 396–97; *FF* ¶¶ 15–16 (copy of the *FF* attached at Add. Tab J).

[4] When this litigation began, Glynn Wayment owned certain properties adjacent to England's. On December 31, 2001, after litigation had already begun, Wayment transferred his property to Benchland Investments, Ltd. There was, however, no evidence of this until the trial. (R. 1571 at 16–17.)

England's property (R. 65, 156).[5] Transecting each of these properties is a portion of the Little Weber Creek system. The creek runs in part in a northwesterly direction toward and eventually into the Great Salt Lake;[6] in other parts, the creek runs southeasterly, toward and into the Weber River.[7] The creek system is very slow moving and, in the area of the parcels of property at issue, the system includes a series of sloughs (*see id.*).[8] There is and historically has been a slough named the Marriott slough (also referred to herein as "the slough") that is located in sections 12 and 13 of Township 6 North, Range 3 West, Salt Lake Base and Meridian and portions of the slough are on property owned by England and Wayment. (R. 2, 14, 65–66, 156–57).[9] At the top of the creek and slough system lies an irrigation pond created by Knight Irrigation Company.[10] Next comes a portion of the creek system called the Knight slough, which lies mostly on Mr. Howard's property (R. 65–66).[11] Finally, a slough system called the Marriott slough transects the property owned by England and Wayment (*see id.*). Messrs. Wayment and England hold a single state-approved water right (No. 35-8073),[12] which permits them only to divert water at a maximum rate of .5 cubic feet per second (cfs) from the Marriott slough up to a total of 75 acre feet of water per year, between May 1st and September 30th, to irrigate 25

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[5] Trial: R. 1571 at 16, 134–35; *FF* ¶¶ 15–16, 17 (*Add. Tab* J).
[6] Trial: R. 1573 at 460–62.
[7] Trial: R. 1571 at 28–29; *FF* ¶¶ 3 & 20 (*Add. Tab* J).
[8] *Id.*
[9] Trial: R. 1571 at 17–18; Trial Exhibit ("Tr.Exh.") 101 (a copy of which is attached hereto at *Add. Tab* C); *FF* ¶ 21 (*Add. Tab* J).
[10] Trial: R. 1571 at 18–21; R. 1573 at 397–99.
[11] Trial: R. 1573 at 397–99.
[12] Trial: R. 1571 at 16 & 135.

acres of property lying northeast from their point of diversion (R. 48, 172).[13] This is the only water right Plaintiffs hold (R. 337).

Water is diverted by Plaintiffs from the slough by way of a pump. (R. 340).[14] At the Northern end of the Marriott slough lies a dam controlled by Plaintiffs, who have the ability to control or even stop the flow of water through the Marriott slough. (R. 338–39).[15] Sometime in 1997, without legal right to do so, Plaintiffs began dredging the Marriott slough, diverting water to the slough from a canal running northeast of the slough, and then began diverting significantly more water from the slough (R. 341–42).[16]

A little after Wayment and England began their dredging, Mr. Howard, who had a permit from the Army Corp of Engineers to do so, in 1998 diked a portion of the Knight slough on his own property, in which he placed a 36-inch pipe and a 15-inch pipe to allow water to pass through the dike (R. 324).[17] He created this dike to erect a fence along his property line to keep his cattle from getting mired in the slough and crossing onto other property.[18] The pipes placed in the dike are more than sufficient to permit the same historic flow through the slough that had existed theretofore (R. 324 & 351).[19] The pipes do not create a head or otherwise cause a backup of water (*see id.* & 354–58).[20] The water level on each side of the dike is the same (R. 324). There has been no additional

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[13] Trial: R. 1571 at 62–65, 74–76, 197–203; 1572 at 259–65; R. 78 (copy attached at *Add. Tab* B); *FF* ¶ 1 (*Add. Tab* J).
[14] Trial: R. 1571 at 22–23; Tr. Exh. 113.
[15] Trial: R. 1571 at 25–27.
[16] Trial: R. 1571 at 53–57, 71–72, 83; *FF* ¶ 13.
[17] Trial: R. 1571 at 71–72; 1573 at 401–03; Tr.Exh. 5.
[18] Trial: R. 1573 at 401–03; Tr.Exh. 27.
[19] Trial: R. 1573 at 401–09; Tr.Exh. 33.
[20] Trial: R. 1573 at 406–09.

ponding on either side of the dike since the installation of the dike (*id.*).[21] Nevertheless, England and Wayment began protesting Mr. Howard's activities.

England and Benchland admit that more than 0.5 cfs has been pumped from the slough since the placement of Mr. Howard's dike (R. 308 & 345).[22] (The pump used by England and Benchland (and, prior to Benchland, by Wayment) to divert water from the Marriott slough pumps up to 10 cfs of water and has pumped at that rate since at least 1998 (*see id.*).)[23] They admit to having used water pumped or diverted outside of the May 1st to September 30th time limit (R. 308, 324, 332–33, 345).[24] They also admit that they have diverted more than 75 acre-feet of water from the slough each year (R. 307, 345).[25] They also admit that they have irrigated more than the 25 acres of land approved for irrigation by their water right (R. 308, 346).[26]

Plaintiffs admit having always had sufficient water to irrigate their land, except at times during the pre-dike period between 1979 and 1997 (R. 347).[27] In fact, since the dike has been put in, Plaintiffs admit to having received more water than they have had for over 40 years. (*See id.*) Despite this, Plaintiffs brought a claim against Mr. Howard and his son William in June of 2001, asserting **(1)** that the Howards have interfered with England's and Wayment's water rights (R. 5–6), **(2)** that the Howards should be enjoined from future interference with England's and Wayment's water rights (R. 6–7), and **(3)**

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[21] *See id.*
[22] Trial: R. 1571 at 59–60; *FF* ¶ 11 (*Add. Tab* J).
[23] *See id.*; *FF* ¶ 11.
[24] Trial: R. 1571 at 199–200.
[25] Trial: R. 1571 at 65.
[26] Trial: R. 1571 at 60–68, 195–98; *FF* ¶ 12, 41 (*Add. Tab* J). These admissions are admission to crimes. *See* UCA § 73-3-3(9), 73-2-27(1)(d) & (2).
[27] Trial: R. 1571 at 68–71.

that the Howards have trespassed on England's and Wayment's property (R. 7).

Lee Howard answered Plaintiffs' complaints and counterclaimed for negligence, private nuisance, and trespass (R. 19–23). With the exception of certain claims for trespass against Plaintiffs for personally trespassing on the Howard property, these claims derive from Plaintiffs' illegal use of the slough, including illegally damming the slough, storing water in the slough without a right to do so, diverting water (since 1997) from the Warren Irrigation Canal into the Marriott slough without right to do so, diverting water (since 2002) into the slough from the Weber River without a right to do so, and wrongfully blocking county drain canals (*see id.*).

Before they could store water in the slough, Plaintiffs were required to establish the dam as a point of diversion and the point from which the water is taken from the stream as a point of rediversion. Plaintiffs' Certificate of Appropriation, however, does not list these points of diversion or rediversion (R. 335), and Plaintiffs have never filed a Change Application (R. 317).[28] They have, however, been storing water in the slough without any right to do so.[29]

Plaintiffs have never filed the requisite exchange application to be permitted to divert water from the Warren Irrigation Canal to the slough and then to redivert it from the slough to irrigate land (R. 315–18).[30] Plaintiffs' Warren Irrigation water rights do not grant the right to Plaintiffs to irrigate any of the property owned by Plaintiffs (*id*.).[31]

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[28] Trial: R. 1571 at 77.
[29] Such activities are criminal. *See supra* note 26.
[30] Trial: R. 1571 at 86.
[31] Trial: R. 1572 at 288.

Nonetheless, Plaintiffs have been doing so since 1997 (*id.*).[32] Similarly, Plaintiffs have also been diverting water from the Weber River to the slough and then rediverting it to irrigation without ever having filed an exchange application.[33]

As noted above (*see* Course of Proceedings, *supra*), the trial court denied Defendants' first *Motion for Partial Summary Judgment* on July 9, 2002, and their second on October 29, 2003 (although the consequent *Order* was not entered until after the close of trial). Trial was held on November 13, 14, and 17, 2003. *Final Judgment* and *Findings of Fact and Conclusions of Law* were entered over the Howards' objections on May 12, 2005, and the Howards appealed the matter on June 8, 2005.

SUMMARY OF ARGUMENT

Under Utah water law, so long as a water right owner receives sufficient water at his point of diversion, in the quantity and of the quality to which his appropriation entitles him, he or she has "no control over or concern with what anyone else may do on or with the stream, or what uses, if any, they may make thereof." *Adams v. Portage Irrigation, Reservoir & Power Co.*, 95 Utah 1, 72 P.2d 648, 653 (Utah 1937); *see also College Irr. Co. v. Logan River & Blacksmith Fork Irr. Co.,* 780 P.2d 1241, 1244 (Utah 1989).

This is precisely the situation Plaintiffs are in, but from which they have expended such remarkable effort and substantial resources to render themselves immune. Plaintiffs' water right gives them the right to divert from the Marriott slough in Warren, Utah, 0.5 cfs from May 1st through September 30th each year, up to a total of 75 acre-feet of water,

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[32] Such activities are criminal. *See supra* note 26.
[33] Such activities are criminal. *See supra* note 26.

to irrigate a specific 25 acres of property. However, they have admittedly pumped more than 0.5 cfs from the slough—and at least 10 cfs since 1998—diverting far more than the 75 acre-feet permitted by their water right and irrigating far more than their permitted 25 acres all in violation of Utah law.

Having thus inarguably always received all of the water to which they are entitled, and having in addition illegally seized even more, Plaintiffs should not have been able to successfully attack Lee Howard's placement of a dike upstream on his own property. And indeed, Plaintiffs adduced no evidence at all that Lee Howard's dike interferes with their water right in any way. Instead of evidence, Plaintiffs simply repeat their incessant mantra that they have the right—somehow—to control all upstream uses of the slough such that they may continue their theft of water, at leisure and with impunity.

Plaintiffs argue that they "supplement" their water with water from alternative sources, and that they store water in the Marriott slough for later use. These actions, however, they cannot legally do, since water from one source, introduced into another, ceases to be distinguishable from the latter. Therefore, in order to divert, or to redivert it, a water user would have to file another application for diversion of water with the State Engineer, since that is the only way to appropriate water under Utah law.

The Howards filed two motions for summary judgment, unsuccessfully. The trial court erred in not granting the Howards' motions, since Plaintiffs' claims were (1) barred by *res judicata*, having already been reviewed by the State Engineer, and (2) there were no material facts at issue.

Although the matter should never have gone beyond summary judgment, it did. At

trial the court, in spite of clear Utah law, ruled against Mr. Howard, based upon representations that the Plaintiffs certificate of appropriation was somehow subordinate to the original appropriator's application, the alleged historic use, and an unauthenticated printout of a web page. Based upon these questionable sources, the trial court concluded that the Howard dike interfered with the Plaintiffs' "method of appropriation," notwithstanding there being no evidence whatsoever that Plaintiffs had ever been deprived of even one drop of the water to which they are entitled due to Mr. Howard's dike. Indeed, Plaintiffs, and unfortunately Mr. Howard's land, is inundated with more water than it was ever contemplated the Plaintiffs or their predecessors would legally use.

Finally, the trial court improperly dismissed Mr. Howard's counterclaims for trespass, nuisance, and negligence, asserting that Mr. Howard had withdrawn his trespass counterclaim (which he had not), and that based upon the court's ruling that the Howard dike interfered with the Plaintiffs' appropriation, Mr. Howard could not prevail on his nuisance or negligence counterclaims based on the flooding of his property by the Plaintiffs.

ARGUMENT

I. INTRODUCTION.

Seldom does an appellant come before this Court seeking relief from such a congeries of clear and plain errors by a trial courts. Astonished and indeed alarmed by the decisions of the trial court—which appear to Mr. Howard to be directly and obviously repugnant to the laws of Utah—Mr. Howard turns to this Court in the hope that his right to use his own property in a way that does not harm his neighbor may be restored.

In complete violation of plain and unambiguous Utah water law, Plaintiffs have dredged a slough they had no legal right to dredge, so as to store water they have no legal right to store, by constructing a dam they had no legal right to construct, in order to irrigate lands they have no legal right to irrigate, with far more water than they have any legal right to use. By so doing, they have illegally overfilled the Marriott slough, illegally altering (to the point of reversing) the natural flow, illegally saturating Mr. Howard's property and transmuting some areas of once-firm pasture land into little more than a wallow. And all of this they have done in open defiance of Mr. Howard's property rights, the authority of the State Engineer: the restrictions on their water right, which they have unblushingly ignored, and an administrative decision they have brazenly circumvented.

But then Mr. Howard raised across the slough the earthen dike at issue, upon which to erect a fence to keep their cattle from straying or sinking belly-deep in slime. This dike is pierced by two large pipes and has had, over the years it has stood, no demonstrable effect whatsoever upon the flow through the slough. Plaintiffs, however (who inexplicably seem to believe theft of water to be legal), indignantly complained that that Mr. Howard's dike somehow "interferes" with their (unlawful) water storage and overuse and haled him into court.

And won.

Lee Howard was—he still is—amazed and dismayed by such an Alice-through-the-looking-glass ruling. It is, in his mind, as though an assassin were to be awarded damages against an innocent bystander for unwittingly walking into the line of fire and ruining a perfectly good murder. Based upon an interference wholly fictional, an equally

quixotic prescriptive right protecting the means by which Plaintiffs get away with liquid larceny, and a set of findings which require conclusions entirely the reverse of those it reached, the trial court has gaveled into insensibility more than a century of once-intelligible water law.

Utterly confounded, adrift in a sea of water law no longer either predictable or protective, Lee Howard comes before this Court for redress.

II. THE TRIAL COURT SHOULD HAVE GRANTED THE HOWARDS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT.

A. Plaintiffs' Claims Fail as a Matter of Law.

1. Plaintiffs Cannot Show Interference.

Water law in Utah is crystal clear: "[A]s long as [a water right owner] receives at his point of diversion the quantity and quality to which his appropriation entitles him, he as an appropriator, has ***no control over or concern with what anyone else may do on or with the stream, or what uses, if any, they may make*** thereof." *Adams v. Portage Irrigation, Reservoir & Power Co.*, 95 Utah 1, 72 P.2d 648, 653 (Utah 1937) (emphasis added). "[S]o long as a water user has sufficient water at its point of diversion to satisfy its right, it has no complaint about upstream uses of water. . . ." *College Irr. Co. v. Logan River & Blacksmith Fork Irr. Co.,* 780 P.2d 1241, 1244 (Utah 1989) (citing *Adams, supra*, and *Conant v. Deep Creek & Curlew Valley Irr. Co.,* 23 Utah 627, 631, 66 P. 188, 190 (1901)).

To prevail on their claims, Plaintiffs had to shoulder the heavy burden of proving that Mr. Howard had "substantially interfer[ed] with the quantity or quality of water that would otherwise reach" them, *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3,

¶25, 5 P.3d 1206; that is to say, of course, the quantity or quality of the water to which [Plaintiffs] **were entitled**." *Id.* ¶28, n.10 (emphasis added). But this Plaintiffs did not—indeed, could not possibly—do.

Plaintiffs' water right gives them the right to divert at a rate of 0.5 cfs from May 1st through September 30th each year, up to an annual total of 75 acre-feet of water to be applied on a specific 25 acres of property.[34] They admit that they have no other water right in the Marriott slough. They also admit that they have pumped more than 0.5 cfs from the slough—and at least 10 cfs since 1998—diverting far more than the 75 acre-feet permitted by their water right and irrigating far more than their permitted 25 acres. (*See* R. 81–83.)[35]

Plaintiffs have thus inarguably always received all of the water to which they are entitled, and then some. As a matter of law (as a matter of common sense), one cannot receive all of the water to which he or she is entitled, of the quality and in the quantity to which he is entitled, illegally seize more water than that to which he or she is entitled, unlawfully store the water (a right to which he is not entitled), and still rationally maintain that he is not receiving his entitlement. In short, you cannot use more and claim to have less at the same time.

Quite aside from the inescapable mathematics, however, Plaintiffs adduced no

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[34] We shall discuss later Plaintiffs' unilateral and illegal expansion of their right to 100 acre-feet. In any event, they have taken far more water from the Marriott slough even than this. Further, it bears noting that the Plaintiffs do not own all 25 acres of the appurtenant land and, therefore, cannot properly claim entitlement to water for all 25 acres; they can legitimately claim only 18.83 acres. (*See* R. 761-62; R. 1571 at 75-77, 134-35, 197-98; R. 1573 at 395-96; Tr. Exhs. 50-65.)

[35] Plaintiffs' admissions, in addition, make it clear that Plaintiffs are in fact guilty of a criminal offense. *See* UCA §§ 73-3-3(9), 73-2-27(1)(d) & (2).

evidence at all that Mr. Howard's dike interferes with their water right—a rather critical prerequisite to prevailing on an interference claim. In fact, besides the admissions referenced above, there is no evidence of the flow at Plaintiffs' historic point of diversion (*see* R. 84); nor is there any evidence of the flow rates of any of the pumps used to divert water from the Marriott slough (R. 88); nor is there any evidence of the number of acre-feet Plaintiffs have removed from the Marriott slough at the historic point of diversion (R. 84–85); nor, again, is there any evidence of either the annual flow in the Marriott slough (R. 88) or the amount of water Plaintiffs have annually pumped from it (*id.*). Moreover, Plaintiffs claim to have had difficulty in getting enough water from the Marriott slough only between 1979 and 1997 (R. 84), before Mr. Howard's dike had even been built.

As a matter of law, then, Plaintiffs could not possibly prove interference with their water right, since both reason and the evidence demonstrate that they have suffered neither diminution nor pejoration of their water. In fact, Plaintiff Wayment admitted in his deposition and at trial that Plaintiffs' ability to get water from the slough has actually improved since the mid-90s:

> **Q.** So is the ability to water out of the slough better now than it was - - let's say in 2002 than it was in 1995?
>
> **A.** Yes, I think. Yes, it is, but it's not better than it was back in 1970 and 1975 in there.

(R. 315, 660; *see also* R. 1571 at 70.) What evidence there is, in sum, shows that Plaintiffs have always received, and have unabashedly taken, far more than their water right allows them to.

Accordingly, there is absolutely no evidence that can support an interference

claim. No evidence shows a decrease in flow. No evidence shows a decrease in pumping capacity. In fact, the only evidence shows that Plaintiffs actually have had fewer problems with obtaining their water since Mr. Howard put in his dike.

2. Plaintiffs Cannot Claim Additional Water.

Basic Utah water law thus clearly establishes that Mr. Howard has not interfered with the quantity or quality of water to which Plaintiffs are entitled. Nonetheless, Plaintiffs argued successfully below that Mr. Howard has interfered with their water right because, having "supplemented" the water in the Marriott slough, they are entitled to remove more water than they are permitted—and, naturally, that the dike somehow, inexplicably, forestalls their wonted overuse.

a. Water which Plaintiffs have added to the Marriott slough is no longer theirs.

Even without considering that they readily admit they have no evidence that they have been shorted any water at all, because they have no records of withdrawals from the Marriott slough (*see* pages 18–19, *supra*), Plaintiffs' underlying premise is flawed. They assume that the so-called "supplemental water" they add to the Marriott slough—water from the Warren Canal—is somehow molecularly distinguishable from the other water in the slough, and that they may therefore use it despite the limitations of the plain language of their Certified Water Right. In other words, Plaintiffs claim that there are two classes of water in the slough: original slough water and added Warren Canal water. Based upon this notion, Plaintiffs contend that although the original slough water may be subject to the limitations of the water right, they may still, without restriction, recapture and reuse the Warren Canal water they have added, which they apparently believe retains its

identity even after being dumped into the slough. This very argument, however, has been rejected on numerous occasions by the Utah Supreme Court.

When water that is diverted from a water source either (1) returns to the same stream system, or (2) commingles with water in the natural water table, it is no longer subject to the rule of recapture and reuse. *Estate of Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223, 1226 (Utah 1992) (citing *East Bench Irrigation Co. v. Deseret Irrigation Co.*, 2 Utah 2d 170, 271 P.2d 499 (Utah 1954); *Stubbs v. Ercanbrack*, 13 Utah 2d 45, 368 P.2d 461 (Utah 1962)). *Stubbs* explains that once irrigation water "becomes commingled with the waters in the natural water table it has lost its identity as irrigation water and is no longer owned by the defendants as such." 368 P.2d at 464. Further, *Stubbs* makes clear that once the water commingles with the water in the natural water table, the rights that others have in that stream system attach to that water. "[T]o whatever extent [the downstream appropriators] had lawfully established prior rights to the use of water from these sources, their rights are entitled to protection and [the upstream appropriator] ***may not encroach thereon and usurp their water by means of his drains and pumps."*** *Id.* (emphasis added).

The Marriott slough, of course, is a part of the Little Weber Creek, a natural water course. Plaintiffs admit to transferring water from the Warren Canal into the Little Weber Creek and Marriot slough (R. 181, 226), commingling the canal water with the water in the natural water table and a natural river system. As a result, the water can no longer be identified as Plaintiffs'; instead, it is subject to the established prior rights of water-right owners in the Little Weber Creek system.

b. Plaintiffs have no legal right to "supplement" the water in the Marriott slough.

"Rights to the use of the unappropriated public waters in this state may be acquired only as provided in [Title 73]." UCA § 73-3-1. Title 73 provides that "in order . . . to acquire the use of any unappropriated public water in the state [a person] shall . . . make an application in writing to the state engineer." *Id.* § 73-3-2. Only after an application has been made and approved, necessary construction has been made, water has been applied to beneficial use, and proof of these things is made, may a certificate of appropriation be given to the applicant. *See id.* §§ 73-3-10, -11, -12, -16, -17. "The certificate is [the water user's] deed; his evidence of title, good, at least against the state, for all it purports to be, and good as against every one else who cannot show a superior right." *Lake Shore Duck Club v. Lake View Duck Club,* 50 Utah 76, 166 P. 309, 311 (1917). The certificate specifies

> the quantity of water in acre-feet or the flow in second-feet appropriated, the purpose for which the water is used, the time during which the water is to be used each year, the name of the stream or source of supply from which the water is diverted . . . and such other matter as will fully and completely define the extent and conditions of actual application of the water to a beneficial use . . . .

UCA § 73-3-17. Water users have no other right to water than appears in their certificate.

Water-right holders desiring to change any aspect of their certificate of appropriation (*e.g.*, the point of diversion or the nature, place, or period of use), they must file a change application and have the applications approved by the State Engineer. *See* UCA § 73-3-3. If a water-right holder intends to take "appropriated water" from a canal place it in another body of water, and then redivert it therefrom, he or she must file a

Exchange Application and, again, obtain state-engineer approval. *Id.* § 73-3-20. Additionally, to store water in another body of water, an additional change application must be filed to establish a point of diversion for the place of storage. *See id.* § 73-3-2(d).

To do as they are doing, Plaintiffs, pursuant to UCA § 73-3-20, should have filed an exchange application showing the supplementation of the waters in the Marriott slough. They did not. Additionally, pursuant to UCA § 73-3-2(10)(d), they should have established a point of diversion for the right to store the water in the Marriott slough. This they have refused to do. Having failed to follow Utah law, Plaintiffs have no right to the "supplemental water" in the slough. *Id.* § 73-3-1 ("Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title.")

Because Plaintiffs have no right to the "supplemental water" added to the Marriott slough, they cannot point to it to establish that they actually have more water than is reflected in their single certificate of appropriation. Nor can they rely on so-called "supplemental water" as a basis to divert more water than their water right gives them, and they have no measurements demonstrating any lack of water anyway.

B. No Disputed Material Facts Barred Entry of Summary Judgment.

Having established that Mr. Howard was entitled as a matter of law to the dismissal of Plaintiffs' interference claim, we must examine the trial court's erroneous determination that material facts were at issue the precluded entry of summary judgment.

1. Plaintiffs' Claims were Barred by Res Judicata.

The trial court's main error in this regard was its determination that Plaintiffs' claims were not barred by the doctrine of *res judicata*. (R. 273.) Actually, however, in a

prior administrative decision, *In the Matter of Application No. 35-10520 (A71312)* (February 26, 1999) (a copy is attached at Add. Tab D), the State Engineer had found and propounded key facts entirely undermining Plaintiffs' interference claim. Plaintiffs were therefore barred by issue preclusion from introducing any facts to the contrary, making it impossible for them even to state a *prima facie* case, to say nothing of prevailing.

As the Court is aware, issue preclusion (collateral estoppel), which prevents relitigation of issues already determined in a previous action, *Macris & Assoc. v. Neways, Inc.*, 2000 UT 93, ¶34, 16 P.2d 1214, takes effect upon the satisfaction of four conditions:

> **(1)** the issue in both actions must be identical;
> **(2)** the judgment must have been final with respect to that issue;
> **(3)** the issue must have been fully, fairly, and competently litigated in the first action;
> **(4)** the party who is precluded from litigating the issue must be either a party to the first action or a privy of a party.

See id. at ¶37.

In December 1998, Plaintiffs filed the Application to "appropriate 260.0 acre-feet from Marriott slough," which water, they claimed, was "water that runs off of upper fields that collects in the Marriott slough." (R. 96.) Throughout the application process, Plaintiffs argued that they sought

> to appropriate waste or seepage water, originally diverted from the Weber River, and which has found its way into Marriott slough. This water is foreign water in the slough and is subject to appropriation and use by application. Specifically, the water at issue constitutes seepage or waste water that drains from irrigation practices on Applicants' land and neighboring lands into Marriott slough. Because the Weber River is not naturally tributary to Marriott slough, this water is foreign to the slough and is subject to recapture and reuse by the original appropriator.

(R. 148; *Request for Reconsideration*, March 17, 1999) (a copy is attached at *Add. Ta*

E). In spite of Plaintiffs' argument, however, the State Engineer rejected their application, having correctly determined that "sufficient unappropriated water to satisfy this application is not available" (R. 96; *Add. Tab* D), and that "[a]fter water collects in the Marriott slough (or Little Weber Creek), it [loses] its unique identity as water which may have been appropriated and used by the applicant and becomes the source of supply for other rights on the Marriott slough." (R. 96.) This ruling was not appealed to the district court.

The issues in the present dispute are obviously identical to those in Plaintiffs' application proceeding. Directly at issue in both matters were the Plaintiffs' water rights in the Marriott slough. Plaintiffs assert in the instant case that Lee Howard has interfered with Plaintiffs' ability to use the water they have directed into the Marriott slough from the Warren Canal. Aside from its illegality as an unauthorized diversion (Plaintiffs having submitted no exchange application before diverting canal water into the slough), Plaintiffs' introduction of canal water into the slough, as discussed above (Section II.B.2.b), deprived the canal water of its separate character, removing it from Plaintiffs' control. More importantly, though, for present purposes, this is precisely the same argument Plaintiffs made unsuccessfully before the State Engineer.

It is undisputed that the State Engineer's 1999 decision on Plaintiffs' application to appropriate was final and was not appealed. And it is indisputable that *res judicata* applies to such administrative decisions:

> Res judicata, which subsumes the doctrine of collateral estoppel, applies to administrative adjudications in Utah . . . [T]he principles of res judicata apply to enforce repose when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over

legal rights and to apply a remedy.

Career Service Review Board v. Utah Department of Corrections, 942 P.2d 933, 938 (Utah 1997) (internal citations omitted). The *Career Service* Court went on to point out that the Department of Corrections had "declined its opportunity to appeal and cannot now successfully argue that the . . . grievance is still pending." *Id.* at 939. The Court held that the Review Board's decision was final and that *res judicata* applied thereto.

The State Engineer's decision as to Plaintiffs' application was likewise a final administrative adjudication of the status of the canal water Plaintiffs diverted into the Marriott slough. Plaintiffs could have appealed the decision, UCA § 73-3-14, but chose not to (R. 82). This satisfies the second element of issue preclusion.

The issue was also fully and fairly litigated. During the application to appropriate proceeding, the State Engineer considered (1) Plaintiffs' application, (2) protests by the Howards and others, (3) Plaintiffs' *Answer* to the protests, (4) the protestants replies to the *Answer*, (5) Plaintiffs' *Request for Reconsideration*, (6) the Howards' *Response in Opposition to Request for Reconsideration*, and (7) held an informal hearing. (R. 66–67. The issue of water rights in the Marriott slough *vis-à-vis* Plaintiffs' rediversion plans wa thus fully and fairly litigated, satisfying the third element of issue preclusion.

The fourth element of issue preclusion is not disputed: Plaintiffs in the prese action are the petitioners who appeared before the State Engineer.

Plaintiffs were, consequently, barred from asserting in the instant case that tl water diverted from the Warren Canal and added to the water in the Marriott slou retains a separate identity. The trial court therefore erred in permitting such allegatio

and, ultimately, accepting them and denying Lee Howard's summary judgment.

2. There were no Material Facts at Issue.

a. The trial court failed to establish which material facts it believed to be at issue, despite its being required to do so.

The rules of civil procedure clearly set forth the procedure to be followed where a court finds that a dispute over material facts bars entry of summary judgment:

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ***shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.*** It shall thereupon make an order specifying the facts that appear without substantial controversy . . . and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

URCP Rule 56(d) (emphasis added). However, despite the rule's plainly placing upon trial courts the duty to ascertain which facts are undisputed and which disputed when addressing a summary judgment motion, the trial court flatly refused the task:

> [T]here are numerous minor and major disputed issues of material facts. The Court does not intend to list or itemize all the disputed facts. In a motion for summary judgment, it is not the Court's role to sort through and sift out all the facts that are "thrown at it" to determine which facts are disputed and which are not.

(R. 272.)

The Howards, of course, were disappointed by the trial court's taking this position, not only because the court's failure to opine as to which facts were actually in dispute burdens the Howards with a review of all of Plaintiffs' alleged disputes of material fact Plaintiffs raised below, but also because those "material facts" are neither material nor, in

some cases, facts at all.[36]

b. The "material facts" Plaintiffs disputed below were neither material nor, in some cases, facts.

i. Whether the dike impedes with slough flow is immaterial. First, whether the Howards' dike impedes or interferes with the flow of water in the slough is not relevant. The only relevant question on summary judgment was whether the Howards had interfered with Plaintiffs' *water right*: the diversion of 75 acre-feet from the slough at the rate of 0.5 cfs for the irrigation of 25 acres of property from May 1st to September 30th

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[36] Procedurally, Plaintiffs' failure to comply with the required provisions of Rule 4-501(2)(B) of the Utah Code of Judicial Administration (now Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure) should have resulted in the Howards' facts being deemed admitted. Rule 4-501(2)(B) required (and URCP Rule 7, in essentially the same terms, still requires) that

> [a]n opposition to a motion for summary judgment . . . begin with . . . a verbatim restatement of each of the movant's statements of fact as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party's contention. . . . . All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted . . . unless specifically controverted by the opposing party's statement.

"Utah courts have repeatedly upheld the necessity of compliance with the Utah Rules o Judicial Administration." *Fennell v. Green*, 2003 UT App. 291, ¶9, 77 P.3d 339 (citin *Hartford Leasing Corp. v. State*, 888 P.2d 694, 701-02 (Utah Ct. App. 1994); *Golding* v *Ashley Cent. Irrigation Co.*, 902 P.2d 142, 148 (Utah 1995); *Price v. Armour*, 949 P.2 1251, 1255 (Utah 1997); *Loporto v. Hoegemann*, 1999 UT App. 175, ¶14, 982 P.2d 586 Failure to follow the dictates of Rule 4-501(2)(B) "estop[s] [a party] from . . . arguing evidence that was not placed before the trial court in compliance with the rule. *Lovenda* v. *Jordan School District*, 2002 UT 130, ¶50, 6 P.3d 705. Even when a party ha "included . . . [its] own statement of facts," if the party "did not refer to [the movin party's] statements of uncontroverted facts," the trial court should reject any reference facts not referenced as required by the rule. *See Fennell*, 2003 UT App. 291, ¶9. Despi the clear requirements of the rule, however, Plaintiffs failed to restate verbatim t numbered paragraphs that are disputed and specifically controvert them. (*See* R. 171–72 Therefore, by the operation of Rule 4-501(2)(B), the Howards' Statement of Undisput Facts, supported by accurate references to the record, must be deemed admitted uncontroverted facts.

each year. Only if Plaintiffs can prove that the Howards have interfered with that *right* are they entitled to prevail. Plaintiffs, however, did not dispute the entire absence of evidence that they have not taken that amount from the slough (*see* R. 309, ¶ 13); to the contrary, Plaintiffs admit that they have diverted more than 75 acre-feet each year at issue, that they have watered lands outside of the 25 acres appurtenant to the right, that they have pumped at a rate far above 0.5 cfs, and that they have irrigated outside of the period permitted by the right. Moreover, the Plaintiffs presented no evidence of the flow rates in the slough.

Whether the Howards' dike has interfered with the flow of water is immaterial unless it were to be offered to show interference with Plaintiffs' water right. As explained above, however, there *is* no evidence that the dike has interfered with the water right; there isn't even any evidence that the dike has interfered with Plaintiffs' overuse of water at all. Plaintiffs nevertheless relied heavily before the trial court upon *Lasson v. Seely*, 238 P.2d 418 (Utah 1951), for the proposition that they somehow have a right to have the slough flow as it has historically has, without the dike, despite an entire lack of any evidence of actual interference. This reliance is fatally flawed.

Lasson, the plaintiff, was "the owner of the right to use the waters of Panawats slough." *Id.* at 419. In fact, he had the right to "the entire flow of Panawats slough." *Id.* at 423. Seely, the defendant, dammed the slough, expressly to raise the water level to assist in the irrigation of his property. *See id.* at 419–20. Two weeks later, Lasson, who measured the flow of the water in the slough, discovered that the flow had decreased. *See id.* at 420. Following the slough upstream, he discovered Seely's dam, which held back

the water and substantially slowed the flow so that little water passed. *See id.* About a week later, Lasson returned and tore out the dam. *See id.* However, during the time that the dam was in, there was only one day on which the flow decreased substantially below 0.51 cfs. *See id.* Even after the dam was removed, the flow in the slough averaged 0.51 cfs.

After trial, the court found that Lasson had been damaged during the period the dam was in and entered judgment in his favor "for partial loss of crops as well as for the expense of tearing out the dam. The trial court entered a restraining order enjoining Seely from constructing or maintaining any dam in the slough, **except that he was permitted to construct check dams of such character as 'not to destroy the present perpendicular banks or alter the bed of said stream, or appreciably interfere with or obstruct the usual, ordinary and continuous flow of the water therein to the plaintiff's land."** *Id.* at 420 (emphasis added).

The Supreme Court reversed the order in part, eliminating the damages for the crop loss because the Supreme Court held that Lasson had failed "to show he was deprived of water for more than a day." *Id.* at 423. However, it upheld the remainder o the trial court's decision, with slight modifications. *See id.*

A review of these facts makes clear that *Lasson* does not stand for the propositio that a party can state a claim of interference without showing actual interference. Firs Lasson had the right to the entire flow of the Panawats slough.[37] Thus, there was n question that he had the right to the entire flow of the water in the entire slough. Despi

[37] In this case, it was established at trial that there are others with water rights on th Little Weber Creek downstream from the Marriott slough. (R. 1573 at 377-79.)

this fact, the Supreme Court **reversed** the trial court's conclusion that Lasson had established an interference claim when the evidence showed that, although the dam was in the slough, the dam actually interfered with the flow on only **one** day. *See id.* at 423. The Court expressly stated that "[i]f the same amount of water seeped through the dam as flowed in the stream bed after the dam was removed, it could hardly be said that the dam stopped the flow of the water or diminished the quantity." *Id.* Further, the Court permitted Seely to continue to place dams in the slough, so long as the placement did not interfere with the flow of the water.

Thus, the *Lasson* case actually strongly supports *Mr. Howard's* position. Despite the fact that Lasson had the right to the entire flow of the slough, which Plaintiffs in this case do not have, Lasson could not prevail on a claim for interference when a dam—not a dike, as in this case—was placed in the slough *unless* he showed actual interference with the flow in the slough. The placement of the dam was not assumed to cause interference. Since Lasson could only prove interference with measurements on one day, the judgment awarding him damages for crop loss was reversed.

ii. The four acre-foot duty—a question of law. Plaintiffs' certificate of appropriation explicitly defines the applicable irrigation duty as "three acre-feet of water per acre of land irrigated per annum" (*see* R. 78, *Add. Tab* B). Plaintiffs' second purported "material fact" in dispute, however, was their contradictory claim to a duty of four acre-feet per acre of land appurtenant to the water right (R. 379) based upon an unauthenticated "Utah Appropriation Policy" setting forth the "general irrigation diversion duty" for western Weber County allegedly appearing on a website maintained

by the State Engineer.[38] Whether Plaintiffs' certificate of appropriation trumps their webpage printout, however, is not a question of fact, but a question of law.

A water user's "certificate [of appropriation] is his deed; his evidence of title . . .," *Lake Shore Duck Club v. Lake View Duck Club*, 50 Utah 76, 166 P. 309, 311 (1917); and, as is well-known, "[i]n the absence of ambiguity, the construction of deeds is a question of law for the court . . . ." *Hartman v. Potter*, 596 P.2d 653, 656 (Utah 1979) (footnotes omitted). In addition, like any other written instrument (such as a certificate of appropriation), "where a deed is plain and unambiguous, parol evidence is not admissible to vary its terms. It is the court's duty to construe a deed as it is written." *Id.*

The trial court, however, ignored the plain language of the certificate and the applicable case law, relying instead upon the worldwide web.

Quite aside from the fact that the duties reflected (whether accurately o inaccurately) in Plaintiffs' webpage printout have not gone through the mandate rulemaking process[39] necessary to give any policy or proposed regulation the force o law—and that it cannot therefore take precedence over a certificate of appropriatio issued pursuant to UCA § 73-3-17 (or its predecessor provisions)—an area's "gener irrigation diversion duty," assuming *arguendo* that such have any legal force at all, applicable to a particular water right only where no specific duty has been prescribed in certificate of appropriation. This is explicitly acknowledged in the page from the intern

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[38] The reference appearing on Plaintiffs' printout is *http://www.waterrights.utah gc wrinfo/policy/wrareas/area35.html.*

[39] "The state engineer shall make rules, ***in accordance with Title 63, Chapter 46a, Ut Administrative Rulemaking Act***, consistent with the purposes and provisions of this titl . . ." UCA § 73-2-1(4) (emphasis added).

that Plaintiffs quote from:

> The *general irrigation diversion duty* for this area, *which the State Engineer uses for evaluation purposes*, is 4.0 acre-feet per acre per year (af/ac) in valley regions of western Weber County . . . . The consumptive use requirements are determined from the publication Consumptive Use of Irrigated Crops in Utah, Research Report 145, Utah State University, 1994, *unless the applicant submits other data for consideration.*

(R. 397 (emphasis added).) Self-evidently, then, these "general irrigation diversion duties" are not set-in-stone directives, but rather presumptive guidelines for the determination of consumptive use for each acre appurtenant to a particular water right. Were a certificate of appropriation, for example, to give its holder the right to divert 1.0 cfs, define the place of use as a 10-acre plot in western Weber County, but leave the duty unspecified, the general practice is to assume that the State Engineer's presumptive guidelines operate to establish a duty limitation of four acre-feet of water for each acre appurtenant to the right. The certificate holder would thus be permitted only 40 acre-feet *per annum*.

As noted in the webpage to which Plaintiffs cite, the presumptive guidelines are based upon figures found in a particular study. However, the "policy" also provides that the duty for a particular parcel can differ from the amount given in the general guidelines if an applicant submits data showing that a different consumptive use applies. In such a case, the State Engineer might set an entirely different duty limitation. If he does so, that duty limitation will be expressed in the certificate of appropriation—just as it is in the present dispute. Accordingly, the "general irrigation diversion duty" limitation does not act, and, having no legal force, cannot act, to differ the express terms of the certificate of

appropriation.[40]

iii. The four acre-foot duty—a lack of foundation. In addition to relying upon an internet printout instead of established law, the trial court took judicial notice of the alleged "Utah Appropriation Policy" despite Plaintiffs' having wholly failed to establish the foundational elements necessary for such notice to be taken.

> Utah Rules of Evidence, Rule 201(b), provides in relevant part as follows:
>
> A judicially noticed fact must be one not subject to reasonable dispute in that it is *either* ***(1) generally known*** within the territorial jurisdiction of the trial court *or* ***(2) capable of accurate and ready determination*** by resort to sources whose accuracy cannot reasonably be questioned.

In this case, Plaintiffs relied upon the second of the rule's methods for taking judicia notice. In doing so, they relied on *Moore v. Utah Technical College*, 727 P.2d 634 (Utal 1986) (R. 379). There, the Utah Supreme Court stated that it could "take judicial notice o administrative rules and regulations as well as published accounts of administrativ proceedings and actions." 727 P.2d at 639, n.17.

The problem with Plaintiffs' reliance on *Moore*, however, is that the *Moore* Cou was relying on a publication of an administrative policy that had been formally adopte and published in book form by the agency. *See id.* In this case, on the other han Plaintiffs cited to no adopted rule or regulation of the agency. Instead, they pointed t their printout: hardcopy of a webpage. Besides the lack of authentication by one havir knowledge that the print-out was actually a true and correct copy of the webpage on th

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[40] Even if the trial court were correct, the Plaintiffs still admit to taking far more wat than they are entitled to take under their rights for the 18.86 acres they actually own. *S supra* note 34.

website, the print-out is both incomplete[41] and explicitly unreliable. The website contains an explicit disclaimer, in fact, as to its own accuracy. (*See* R. 677.)

An agency's regular, formal adoption and publication of rules and policies in book form differs significantly from potentially outdated or inaccurate information provided as a convenience on a website. This potential unreliability (avowed and cautioned against on most such websites) removes internet printouts such as Plaintiffs' "Appropriation Policy" from the roster of Rule 201(b)(2)'s contemplated "sources whose accuracy cannot reasonably be questioned." To the contrary, such sources should routinely be questioned and double checked before anyone relies upon them.[42] Plaintiffs should not have asked the trial court to take, and the trial court never should have taken, judicial notice of the printout upon which Plaintiffs relied for their claim to four acre-feet per acre.

iv. Improper irrigation. Plaintiffs also claim that there was a factual dispute as to whether they improperly irrigated land outside of the 25 acres specifically appurtenant to the water right at issue in this case. This, however, was not a factual issue but another legal one. Additionally, the affidavit of Edward England, upon which Plaintiffs relied, establishes only that England has been watering certain property other than the 25 acres at issue (although he does not identify which property) from Warren Irrigation shares. It did not establish that England could *legally* take water from the Marriott slough for that

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[41] The first page cuts off the text of the right margin (R. 393).

[42] Elsewhere on the Water Rights website, for example, a stockwatering table provides figures showing how much water various animals require (the "livestock duty" it might be called): a horse gets about 25 gallons a day; a pig, about 5 gallons; an ostrich, almost 3¼; a deer, about 1¼; and a chicken, around ¾ of a gallon per day. Foxes and mink, however, due to an erroneously inserted zero, are permitted a daily water ration of only 11.2 *tablespoons* (*see http://www.waterrights.utah.gov/wrinfo/policy/wateruse.asp*). This error is much talked of among mink farmers, but it has yet to be corrected.

same time (R. 372, 380). The affidavit asserted only that the Warren shares have been the source of irrigation water for unidentified property; it did not even identify the point of diversion. (*See id.*)

v. The sufficiency of water from the slough. Plaintiffs' next purported factual dispute was whether they have had sufficient water to irrigate from their approved water right. Plaintiffs "evidence" on this point was their own allegation that they have had to supplement the water in the slough with Warren Irrigation water. But this is not "evidence"; it is a legal argument susceptible only to a legal determination. It is most certainly not a disputed issue of material fact.

Plaintiffs' water right allows them to divert 0.5 cfs from May 1st to September 30th each year up to a total of 75 acre-feet, to be applied on a specific 25 acres. They admitted they have no other water right in the Marriott slough. They also admitted that they have diverted more than 0.5 cfs from the slough, diverted far more than 75 acre feet of water per year, diverted during periods outside of May 1st to September 30th each year, and irrigated more than the 25 acres identified in the water right.

They also readily admitted that their ***only*** complaint with Mr. Howard's dike that the pipes in the dike are, in their opinion, too high. When England was asked deposition to explain why he was concerned with the dike, he stated:

> Q. Tell me what those concerns are.
> A. It impedes the flow of water.
> Q. How can you tell it does that? Tell me what things you've observed that tell you that.
> A. Well, before it was there the water flowed on the bottom of the creek. Okay? The bottom of the slough.
> Q. Okay.
> A. And it was not impeded. Now that its there, there's no way for the

> water to travel at the bottom of the slough. The pipes that are installed are elevated above the bottom of the slough by some – I estimate about 18 inches.

(R. 657.) Wayment agreed: "Q. So, in your view, the pipe should be further down or more submerged? A. Right. If it was like that, we wouldn't be here today" (R. 660). In fact, Wayment admitted in his deposition that the ability to get water from the slough was better now than in 1995, before the Howards' dike was constructed.

> Q. So is the ability to water out of the slough better now than it was—let's say in 2002 than it was in 1995?
> A. Yes, I think. Yes, it is, but it's not better than it was back in 1970 and 1975 in there.

(R. 660.) Plaintiffs thus cannot credibly or rationally claim any interference with their water right, since they receive all the water to which they are entitled, and a great deal more to which they have no entitlement whatever.

vi. Improper storage. Plaintiffs claim that whether they improperly store water on their land is a disputed issue of material fact. Plaintiffs claim that they are entitled to store the water pursuant to their Application to Appropriate. This, yet again, however, is a legal argument requiring yet another legal conclusion. And in any case, quite aside from their arguments attempting to rationalize their illegal storage of slough water, Plaintiffs have still to address their illegal diversion of Warren Irrigation water to storage in the slough without ever having filed the required exchange or change application—which is itself another legal argument.

vii. Purpose for the Dike. The last of Plaintiffs' purported disputes of material facts was whether Mr. Howard built his dike to control cattle or to control the slough. Just as above (*see* Section II.B.2.b.i, *supra*), this is immaterial. Intention has nothing to do

with a determination as to whether Plaintiffs' water rights were interfered with or not.

C. Conclusion to Part II.

This matter never should have gone beyond summary judgment: Plaintiffs have suffered no interference with their water right or their use (and abuse) of water thereunder. Plaintiffs have not even shown a diminution in the flows through the slough. In fact, Plaintiffs obtain more water now than before the Howards' dike was built.

The "disputed material facts" to which Plaintiffs successfully pointed below were in fact legal arguments or irrelevancies. No genuine issues of material fact existed to bar summary judgment, and the Howards were entitled to judgment as a matter of law on Plaintiffs' First and Second Claims for Relief.

Finally, the trial court's adoption of Plaintiffs' position makes no legal (or practical) sense. Moreover, ruling in Plaintiffs' favor, despite Plaintiffs' admissions that they have sufficient water and are indeed illegally using more water than they are permitted, stands Utah water law on its head.

Lee Howard was entitled to entry of summary judgment and the dismissal of Plaintiffs' first and second claims for relief. The trial court erred in refusing to grant relief accordingly.

III. THE TRIAL COURT'S FINAL JUDGMENT MUST BE REVERSED, BASED AS IT IS UPON UNSUPPORTED FINDINGS OF FACT AND INCORRECT CONCLUSIONS OF LAW.

A. The Evidence does not Support Several of the Trial Court's Critical Findings of Fact.

1. Plaintiffs' Diversion of Water, Historically, was not Based upon a Pumping and Refilling Cycle.

Much of the trial court's *FF&CL* rest upon the court's acceptance of an alleged "pumping and refilling cycle":

> 4. A ["diversion] dam" . . . on the north end of the slough is used and has always been used to allow the slough to fill so that the water can then be pumped to plaintiffs' crops. After pumping, the slough refills, and then when needed, the pump is turned on for another watering cycle. This process is referred to below as the "pumping and refilling cycle."
>
> . . . .
>
> 6. The water right Application describes the nature of the slough and how the water was/is obtained. The pumping cycle is described in the Proof of Appropriation.
>
> . . . .
>
> 8. This pumping and refilling cycle is how plaintiffs' water right has been used historically
>
> 9. The original appropriator, Mary E. Marriot, explained in her June 10, 1915, letter to the State Engineer how the slough operated when the water right was first approved. She explained that she used the dam at the end of the slough to fill the slough and store water, allowing it to be pumped for irrigation.
>
> 10. At the end of the irrigating season, the diversion dam was breached, allowing the slough to empty. That is how the slough and the water right are used today. Plaintiffs' water right cannot be use without this pumping and refilling cycle.

(R. 1330–31.) The evidence, however, does not support these findings.

a. Marshalling of the evidence.

Defendants introduced into evidence Mary E. Marriott's March 6, 1913, *Application to Appropriate Water* for irrigation. (Tr.Exh. 102, Tab 18.) In the "Explanatory" section, Marriott wrote (and Plaintiff Wayment read into the record),

> The source of this slough is drainage and waste water and it is not probable that a continuous flow of one sec.ft. can be obtained, but it is the intention of the appropriator to pump as much as possible at a time and then resting until [*sic*] the slough fills again.

(R. 1571 at 41.) Wayment then testified,

> This is the way the slough was operated all my life, it's operated the way

my father had it and we've had it, is the water come in, we let it rest and then we pumped it and that cycle continued to keep us in water.

(*Id*.) Defendants then introduced the following "General Remarks" from the *Proof of Appropriation* for Marriott's water right (No. 5095) (Tr.Exh. 102, Tab 19):

> The flow measured as follows: "H" = .62', "L" = 1', Q = 1.626 sec.ft. The above flow is not continuous. The pump used is a No 5 American with a capacity of 735 gals. per minute. During the season of 1914 the plant was operated a day then it would be necessary to wait a day or so untill [*sic*] the slough would refill before continuing. The slough supplied water for only 25 acres in 1914, but there are 50 acres in condition to irrigate and the slough will supply sufficient water (1 sec. foot continuous) nearly every season.
>
> The above measurement was taken when the plant was working its full capacity. The plant is operated 24 hrs. and then rests 48 hrs., the average flow being 0.53 cu. ft. per sec.

(R. 1571 at 42–43.) There followed a brief colloquy:

> Q All right. Now, . . . where it says that during the season of 1914, the plant was operated a day and then it was necessary to wait a day or so until the slough would refill before continuing. . . . [H]ow does that description compare with the way you've been irrigating since you've been on that land?
>
> A That is the same way we have operated. We have never changed from this system.

(*id* at 43), after which a brief letter from Marriott to the State Engineer was read into t record (spelling, punctuation, indentation, and capitalization as in original):

> Dear Sir in regards the application No 5095 for water
>
> I will try to explain I close the dam as Soon as I start Watering and hold it all in Slue and last year I Watered crop 4 times running Engine three days and nights or 72 hours each time and the Slue was dry by the last of August When the water is taken out of the river for irrigation There is very little Sokage comes in the Slue so I have to store the water I am Writing this to give you some Idea of the quantity of water
>
> I use a No 5 American pump and raise water 17 ft

(R. 1571 at 43–44, Tr.Exh. 102 Tab 22.) Wayment then testified that Plaintiffs curre

operate "[t]he same way. We're still irrigating the same way today." (R. 44.)

England later testified similarly, though in less detail:

> Q All right. You heard Mr. Wayment testify about the pumping and refilling cycle that he's described and you heard me read from the water right file about how the slough fills, the pump, rest. Is that consistent with how the slough's been operated since you've been on the property?
> A Yes.

(R. 1571 at 151.)

b. The evidence does not support the trial court's findings.

In adducing this evidence, Plaintiffs implicitly argued—and the trial court apparently agreed—that certain statements made in the applications to appropriate control over the express language of the certificates of appropriation. However, even if the application could be read to grant Plaintiffs such broad authority, the certificate of appropriation is the controlling legal document, not the application. In *Little v. Greene & Weed Investment*, 839 P.2d 791, 795 (Utah 1992), the Utah Supreme Court reaffirmed that water rights are not appurtenant to land until a water right certificate had been issued. In doing so, the Court explained that one of the practical reasons for its decision was that the certificate of appropriation, the controlling legal document, may grant rights different from those requested in the proof and application. "[B]ecause the extent of the water use claimed in the proof of appropriation and the extent of use ultimately certified by the State Engineer may differ, a grantee of land may not receive the entire water use believed to be appurtenant and presumably purchased at the time of the transfer, if mere proof of appropriation were sufficient to make water appurtenant to land." *Id.* at 796. It is

therefore clear that the proof of appropriation does not grant rights, but the certificate of appropriation.[43] (*See also* R. 1572 at 258.)

Thus, any argument based upon what the application or proof might say is of no significance. The certificate of appropriation alone controls. In this case, it is clear: "This certificate entitled the holder to use five-tenths of a cubic foot of water per second intermittently for the land area described; but, the said holder is not entitled by virtue of this certificate to use to exceed the equivalent of three acre-feet of water per acre of land irrigated per annum." Plaintiffs have no additional rights, either to store water or to pump at a higher flow rate.

Plaintiffs, perhaps recognizing the inherent problems in their arguments, use the language of estoppel and adverse possession, claiming that the right has always been used a particular way or that they have always pumped more than 0.5 cfs from the slough Utah water law is not subject to these doctrines. UCA § 73-3-1 states: "No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession." Similarly the doctrine of estoppel is inapplicable to the facts of this case. *See Wellsville E. Field Irrigations Co. v. Lindsay Land & Livestock Co.*, 104 Uta 448, 137 P.2d 634, 645 (Utah 1943). Additionally, because the right to use of wate derives from the state, both doctrines would necessarily have to be asserted against th

---

[43] Of course, if a water right holder disagrees with the amount of diversion rate for wat granted in the Certificate of Appropriation, he or she has a right to appeal the Sta Engineer's determination to the District Court. *See* UCA § 73-3-14. The appeal must filed within thirty days of the final agency action. *See* UCA § 73-3-14; *id.* § 63-46 14(3)(a). The records of the State Engineer reveal no such appeal by England, Wayme or their predecessors-in-interest for the 0.5 cfs, 75 acre feet total, or 3 acre feet du awarded in the Certificate of Appropriation for Water Right No. 35-8073.

State, not the Howards.

2. *The Flow of the Marriott slough is not "Generally South to North."*

The trial court's *FF* ¶ 20 declares that "[t]he slough has a generally south to north flow . . . ." (R. 1456; *Add. Tab* J)[44] This finding contradicts the evidence. The slough does *not* "generally" flow south to north—if by "generally" the court means to include those portions of the slough upon the eastern part of the Howard property ("East Howard slough"). On the contrary, the evidence makes it abundantly clear that, while *portions* of the slough—including those on the western half of the Howard property—do flow south to north, water in the East Howard slough flows instead through a drain beneath 5900 West street where it enters a county drainage ditch carrying water from lands further north south to the Weber River.

The Howards cannot marshal evidence which does not exist, of course; and there is no evidence at all that water in the East Howard slough naturally flows "northward" onto the England property.

On the other hand, water in the East Howard slough can be *forced* over the northward/eastward watershed and into the north-flowing Marriott slough. (R. 1571 at 28–29, 1573 at 411–14, 418, 459–60, & 462–65.) By placing a tin in the county drainage ditch on the east side of 5900 West, Plaintiffs can (and do) divert the water from the

---

[44] The trial court defines the slough as

> begin[ning] at the north end of property owned by plaintiff Wayment, continu[ing] southward through the England property, then through the Lee Howard property, and terminat[ing] at a point identified by the parties as the 'separation tin' on property owned by Knight Irrigation Company.

(*Id.*, *FF* ¶ 21 (*Add. Tab* J).)

county drainage ditch and into the East Howard slough, at the same time blocking any water from leaving it (*see id.*).[45] This eventually overfills the East Howard slough (flooding the Howards' land in the process), creating the single, enormous, illegal marsh whence Plaintiffs draw the stolen water to supply their unlawful overappropriation (R. 1571 at 480–94).

3. The Trial Court Abused its Discretion in Ruling that the Howards' Dike Interferes with the Plaintiffs' Water Right.

The trial court found that "[t]he [Howards'] dike interferes with plaintiffs' water right by affecting the slough and how it naturally operated. The dike has decreased the flow of water to plaintiffs' pump and otherwise changed the way the slough functions by changing its flow." (R. 1457: *FF* ¶ 29 (*Add. Tab* J).) The court's *CL* echo this finding: "[the Howards'] dike constitutes interference with plaintiffs' water right." (R. 1460: *CL* ¶ 5.)

a. Standard of Review.

Because the trial court had "first [to] find facts relevant to the issue . . . and then determine whether those facts [were] within the ambit" of interference, this issue is best viewed as a mixed question of fact and law. *See Searle v. Milburn Irrigation Co.*, 2005 UT 58, ¶15, 533 Utah Adv. Rep. 49 (discussing the analogous situation of impairment of water rights) (*Searle* is as yet unpublished; a copy is included at *Add. Tab* M). In "reviewing a district court's conclusion regarding a mixed question of fact and law,

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[45] Plaintiffs, as they are wont, have filed no applications for the diversion, storage, and use of this water either. Neither that flowing in the county drainage ditch or that added to the resultantly bloated East Howard slough.

[appellate courts] typically grant some level of deference to the district court's application of the law to the facts," *id.* at ¶16 (citing *State v. Pena*, 869 P.2d 932, 937–39 (Utah 1994)); the "discretion afforded varies, however, according to the issue being reviewed," *id.* (citing *State v. Hansen,* 2002 UT 125, ¶26, 63 P.3d 650). The more fact-sensitive the application of the law to the facts, the greater the discretion a reviewing court gives the trial court in the review of its determination as to whether the facts fall within the established rule of law. *See, e.g., Chen v. Stewart*, 2004 UT 82, ¶20, 100 P.3d 1177. In "extremely fact-sensitive" matters, the marshaling requirement also applies to the facts to which the trial court applied the legal standard. *Id.*

The appellate courts in Utah "consider multiple factors when determining how much deference to grant a district court's application of law to facts," *Searle*, 2005 UT 58, at ¶16 (citing *Jeffs v. Stubbs,* 970 P.2d 1234, 1244 (Utah 1998)), that is, in determining just how fact-sensitive a given issue is:

> Specifically, we analyze whether **(1)** the facts at issue are so complex, and arise in such variation, that it would be impractical to supply a rule that adequately accounts for the implications of all the facts; **(2)** the context in which the application of law to facts occurs is somehow novel or new, such that appellate courts are unable to discern and clearly state what factors are outcome determinative; and **(3)** the district court has observed facts that are not adequately preserved by a record of the proceedings before it, *e.g.*, witness demeanor.

Id. (citing *Pena,* 869 P.2d at 938-39).

In the present dispute, however, first, the facts—as embodied in the trial court's

FF—are neither varied nor complex.[46] The legal context, second, is hardly "novel": the Utah courts have been analyzing interference claims at length for well over a century. Indeed, the findings necessary to validate an interference claim have long been established: whether or not the claimant is (a) receiving at his point of diversion (b) the quantity, and (c) the quality, of water (d) to which his appropriation entitles him. *See Adams v. Portage Irrigation, Reservoir & Power Co.*, 95 Utah 1, 72 P.2d 648, 653 (Utah 1937). Third, and finally, none of the evidence in this case requires the examination of "witness demeanor" or other nuances in order for the law to be correctly applied.[47]

In *Searle*, because of "myriad factual scenarios, interplaying with complex scientific principles" and the absence of any "meaningful[] constrain[t]" in Utah case law upon trial court discretion "to conclude that evidence of impairment is sufficient to prevent approval of a change application,"[48] the Court determined that the district court should be granted "at least some deference." 2005 UT 58 at ¶17. However, the *Searle* Court then went on to note that,

> given the importance of water in this state, there is a strong public policy interest in promoting consistent and predictable results in disputes over the permissible use of that water. Therefore, it is appropriate that district court discretion be somewhat constrained in this area.

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[46] Although the reasoning behind their promulgation is alarmingly incomprehensible, the trial court's *FF* are nevertheless quite straightforward—they merely require conclusions entirely at variance with those the trial court ultimately rendered.

[47] It is true that the trial court did visit the slough, but the photographic and testimonial evidence is sufficiently clear to render the judge's (erroneous) determinations arising therefrom merely a gloss on the actual facts adduced at trial.

[48] The *Searle* Court also noted the "district court['s] . . . ability to assess witness demeanor and credibility, factors that are not readily discernable from a cold record," 2005 UT 58 at ¶17 (citation omitted); the *Searle* decision, however, does not appear to have turned upon this factor.

Id. at ¶18 (citing *Jeffs v. Stubbs,* 970 P.2d 1234, 1244 (Utah 1998)). As a result, the Court concluded that the "district courts enjoy significant, but not broad,[49] discretion when determining whether evidence of impairment is sufficiently compelling to foreclose application approval." *Id.* (citing *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.,* 2004 UT 67, ¶50, 98 P.3d 1.)

In the present dispute, where none of the considerations germane in *Searle* pertain, this Court's deference to the trial court's inferences *vis-à-vis* interference should logically be substantially less than *Searle's* "significant discretion."[50]

b. The Trial Court Abused its Discretion by Ruling that the Howards Have Interfered with Plaintiffs' Water Right.

As discussed at length above, pp. 6–7, Part II.A, and Part III.A.1.b, *q.v.*, Plaintiffs cannot legally prove interference from the facts adduced in the record.

B. <u>The Trial Court's Final Judgment in Plaintiffs' Favor was also Based in Part upon a Series of Incorrect Conclusions of Law</u>.

1. Plaintiffs' are Limited by their Water Right to a Duty of Only Three Acre-Feet. Not the Four Acre-Feet Claimed by Plaintiffs and Found by the Court.

The trial court's *FF* include a "finding" declaring that

Plaintiffs and all irrigators in Weber County are entitled to four acre-feet of

---

[49] The "spectrum of discretion" runs from "'de novo' on the one hand to 'broad discretion' on the other." *Pinecrest*, 2004 UT 67 at ¶50 (citing *State v. Pena,* 869 P.2d 932, 937 (Utah 1994). "Significant discretion," then, "falls somewhere between the two ends of the spectrum." *Id.*

[50] This is especially true in a case where, as here, the district court's ruling in Plaintiffs' favor creates an absolute right in any downstream user to bar *any* upstream use, regardless of whether they are receiving their allotted water (or even illegally supplementing it)—in blatant disregard for more than a century of Utah water law, under the façade of "protecting their method of appropriation."

> water per acre of land irrigated. Although the [Plaintiffs'] Certificate [of Appropriation] provides for a duty of 3 acre feet per acre irrigated, that duty was increased for Weber County.

(R. 1456: *FF* ¶ 22 (*Add. Tab* J).) The trial court, however (and Plaintiffs, who prepared the findings), were plainly in error: this is a conclusion of law, not a finding of fact:

> Factual questions are generally regarded as entailing the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind. Legal determinations, on the other hand, are defined as those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances.

State v. Pena, 869 P.2d 932, 935 (Utah 1994)(citing Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 *Marq.L.Rev.* 231, 236 (1991)). Construction of written documents, such as certificates of appropriation, is of course a question of law, s*ee Hartman v. Potter*, 596 P.2d 653, 656 (Utah 1979), as is a blanket declaration of irrigation duties in Weber County, such as the trial court's "*Finding*" No. 22. This legal issue is thus subject to correctness review rather than the factual clear error.

The Howards discuss at length the primacy of certificates of appropriation over any other source—including nonregulatory policies posted on the internet—in Section II.B.2.b.ii & iii, above. Commending that discussion to the Court's reperusal, the Howards here reiterate only that in construing a deed, such as the Plaintiffs' Certificate of Appropriation, a court must "determine . . . intent from the plain language of the four corners of the deed." *RHN Corp. v. Veibell*, 2004 UT 60, ¶40, 96 P.3d 935 (quoting *Ault v. Holden*, 2002 UT 33, ¶38, 44 P.3d 781). Moreover, a court may not look to extrinsic evidence, like websites, unless there is an ambiguity in the instrument. *Id.* (citing 23 *Am.Jur.2d* Deeds § 192 (2001).)

Here, the language at issue could hardly be more plain: "three acre-feet of water per acre of land irrigated per annum" (Tr.Exh. 1; *Add. Tab* B). That is all the water Plaintiffs may legally claim, and the trial court erred grievously when it ruled that the language of the Certificate had been displaced by a website.

2. The Howards Never Withdrew their Counterclaim for Trespass against Plaintiffs.

In its *Decision* of August 23, 2004 (a copy of which is attached at Add. Tab L), the Court declared that "the Defendants' trespass claim was formally withdrawn at trial" (R. 1385). Actually, however, it was Plaintiffs whose trespass claim was dismissed (not withdrawn):

> THE COURT: . . . . With all due respect to the plaintiffs, I don't think you've proven the trespass specifically against Bill Howard and that matter will be dismissed at this particular point. . . . So I am granting [the Howards'] Motion to Dismiss on the cause of action in regard to trespass on Bill Howard. . . .
>
> . . . .
>
> MR. SMITH: Thank you, Your Honor, . . . the trespass claim also went against Mr. Lee Howard. We ask that that be dismissed against him as well.
>
> THE COURT: . . . . I'll grant that motion. That matter will be dismissed as well so that trespass is done.

(R. 1573 at 330, 333–34.) The Howards never withdrew their trespass counterclaim against Plaintiffs. Since the trial court's dismissal of the Howards' counterclaim for trespass was based solely on the erroneous notion that the Howards had withdrawn it, the dismissal must be reversed and the trespass counterclaim reinstated.

That their trespass claim is indeed a valid one is equally clear:

In order to establish a trespass in Utah, a plaintiff must prove that a defendant wrongfully entered upon his lands. *See Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d

1238, 1243 (Utah 1998) (citing *O'Neill v. Sand Pedro, L.A. & S.L.R. Co.*, 38 Utah 475, 479, 114 P. 127, 128 (1911)). However, such a defendant is liable for trespass only if "he intentionally . . . enters land in the possession of the other, or causes a thing or a third person to do so. . ." Restatement (Second) of Torts § 158(a) (1965):

> The actor, without himself entering the land may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it.
>
> . . . .
>
> Thus, . . . it is an actionable trespass to throw rubbish on another's land, even though he himself uses it as a dump heap, or to fire projectiles or to fly an advertising kite or balloon through the air above it, even though no harm is done to the land or to the possessor's enjoyment of it.

Id. cmt. i. In the present case, as discussed extensively above, Plaintiffs have caused water to flood onto the Howard property by illegally damming the Marriott slough. Having done so, they are liable for trespass and deprived Mr. Howard of the use of his own property.

In this case, as discussed above, Part III.A.2, the evidence showed that Plaintiffs possess no legal right to dam the slough or the drainage ditch. Nor was any evidence adduced that the Howard property was ever flooded as part of an irrigation system before 1998.

3. The Howards have a Valid Counterclaim for Negligence against Plaintiffs.

The evidence adduced at trial demonstrated not only that Plaintiffs' conduct caused a trespass, but also that it rendered them liable for negligence:

> A possessor of land[, declares Utah case law,] is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm, if

(a) the possessor has created the condition, or
(b) the condition is created by a third person with the possessor's consent or acquiescence while the land is in his possession, or
(c) the condition is created by a third person without the possessor's consent or acquiescence, but reasonable care is not taken to make the condition safe after the possessor knows or should know of it.

AMS Salt Industries, Inc. v. Magnesium Corp., 942 P.2d 315, 322–23 (Utah 1998). Thus, a person who creates an artificial condition on land, which he realizes involves an unreasonable risk, is liable for any harm done to another person's property caused by his conduct. Utah statutory law likewise "imposes an affirmative duty of care upon those who divert waters for their own use," *Dougherty v. California-Pacific Utilities Company*, 546 P.2d 880, 882 (Utah 1976): "'The owner of any ditch . . . or other watercourse shall maintain the same in repair so as to prevent waste of water or damage of property of others.'" *Id.* (quoting UCA § 73-1-8.)

In this case, the evidence clearly demonstrated that Plaintiffs created an artificial condition in the slough by (illegally) damming both the slough itself and contiguous county drains, (illegally) diverting water to the slough, and (illegally) storing water therein. (R. 1573 at 480–94). These actions caused water to back up in the slough, damaging the Howard property. (*See id.*) Plaintiffs, moreover, acted willfully or with a reckless indifference to Mr. Howard's property rights.

Mr. Howard's negligence claim is thus not only valid but demonstrably correct. The trial court was therefore in error when it dismissed it.

4. The Howards have a Valid Counterclaim for Nuisance against Plaintiffs.

"Non-trespassory invasions of a person's interest in the use and enjoyment of land

resulting from another's interference with the flow of surface water" are claims for nuisance. *See Sanford v University of Utah*, 26 Utah 2d 285, 488 P.2d 741, 744 (Utah 1971), *superceded by statute on other grounds*. "[W]here one person drains or cultivates his land, grades it, [etc.] . . ., he usually interferes with the flow of surface water upon it or across it. . ." *Id* If "the invasion is intentional, liability depends on whether the invasion is unreasonable." *Id.*

As discussed above, the evidence adduced at trial showed that Plaintiffs' actions altered the surface water flow to such an extent that it damaged—flooded, inundated, swamped—Mr. Howard's property, turning a significant portion into a dangerous fen. Sadly, the evidence also shows that Plaintiffs' actions were undertaken either intentionally or knowingly, or in reckless disregard for Mr. Howard's property rights. Given that the action was illegal and done without respect for Mr. Howard's rights, it was unreasonable.

IV. CONCLUSION.

In the world proposed by Plaintiffs, we must disavow Utah's carefully crafted and well-reasoned water law in favor of a capricious regime under which those who have suffered no wrongs—indeed, those who are themselves acting wrongfully—may compel those who have not harmed them to submit to their enormities under the pretence of protecting a "method of appropriation" which is itself illegal.

Utah law, however, denies any standing to those who have suffered no harm, and Utah water law particularly notes that those who are receiving the water to which their water right entitles them cannot complain about (to say nothing of enjoining) anyone

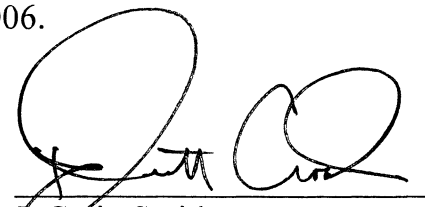
else's use of the stream. Now, were Plaintiffs to point to some diminution in the quantity of their water, or some pejoration of its quality, and demonstrate that the Howard dike was the source of the loss, then they might have a legally cognizable claim. Such is not the case, however. Plaintiffs freely admit that they misappropriate far more than the 75 acre-feet to which their certificate of appropriation entitles them, at 20 times the rate it permits, to water at least 2½ times the acreage it allows. They, however, hale Lee Howard into court to answer for their having placed a dike in the slough (a dike the Army Corps of Engineers approved with the acquiescence of the state engineer), which does not interfere with their water right in the slightest, on the grounds that it disturbs the bloated and illegal overuse to which they have become accustomed.

Even if the Lee Howard dike *did* somehow affect Plaintiff's water right, however—which it does not: it would first have to drain away thousands of gallons of additional, illegally seized water before even reaching the water permitted by the actual right—a burglar should hardly be able to demand police assistance to force a victim's door because he has had the impertinence to lock it. And more alarming still, in this case, the police officer should not have agreed to assist him.

In light of these points, as set forth at length in the foregoing brief, Lee Howard respectfully requests this Court, **first**, to reverse the trial court's Order denying the Howards' motions for summary judgment and to order the trial court to enter judgment in favor of Lee Howard on Plaintiffs' interference claims; **second**, in the alternative, to vacate the trial court's Final Judgment as to Plaintiffs' interference claims; **third**, to order the trial court to enter judgment in favor of Lee Howard as to his trespass, nuisance, and

negligence counterclaims, and to enjoin Plaintiffs' acting outside the bounds of their certificate of appropriation; and **fourth**, to remand this matter to the trial court for a determination of punitive damages and attorney's fees.

Dated this 5th day of January, 2006.



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CERTIFICATE OF SERVICE

On this 5th day of January, 2006, two true and correct copies of the foregoing **APPELLANT'S BRIEF** was sent through the United States mail, first-class, postage prepaid, addressed as follows:

John H. Mabey, Jr.
David C. Wright
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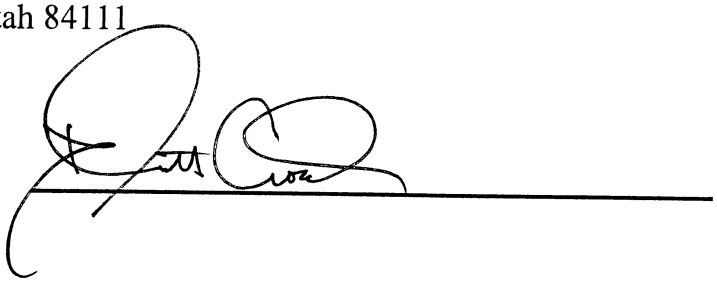


ADDENDUM

STATUTES CITED IN THE BRIEF BUT NOT REPRODUCED VERBATIM THEREIN.	**Tab A**
TRIAL EXHIBIT NO. 1, *CERTIFICATE OF APPROPRIATION*, MARY E. MARRIOTT, MARCH 8, 1913.	**Tab B**
TRIAL EXHIBIT NO. 101, MAP OF THE MARRIOTT SLOUGH SYSTEM.	**Tab C**
THE STATE ENGINEER'S *MEMORANDUM DECISION*, FEBRUARY 26, 1999.	**Tab D**
PLAINTIFFS' *REQUEST FOR RECONSIDERATION*, FILED WITH THE STATE ENGINEER, MARCH 17, 1999.	**Tab E**
DECISION OF JULY 9, 2002, DENYING DEFENDANTS' *MOTION FOR PARTIAL SUMMARY JUDGMENT*.	**Tab F**
MINUTE ENTRY OF OCTOBER 29, 2003, DENYING DEFENDANT'S *MOTION FOR PARTIAL SUMMARY JUDGMENT*.	**Tab G**
ORDER DATED NOVEMBER 20, 2003.	**Tab H**
TRIAL COURT *DECISION* OF APRIL 27, 2004.	**Tab I**
FINDINGS OF FACT AND CONCLUSIONS OF LAW, FILED MAY 12, 2005.	**Tab J**
FINAL JUDGMENT, ENTERED MAY 12, 2005.	**Tab K**
TRIAL COURT *DECISION*, AUGUST 23, 2004.	**Tab L**
SEARLE V. MILBURN IRRIGATION CO., 2005 UT 58, 533 UTAH ADV. REP. 49.	**Tab M**

UCA § 73-3-1. APPROPRIATION — MANNER OF ACQUIRING WATER RIGHTS.

Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in rights; provided, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in Section 73-3-8. No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession.

UCA § 73-3-2. APPLICATION FOR RIGHT TO USE UNAPPROPRIATED PUBLIC WATER — NECESSITY — FORM — CONTENTS — VALIDATION OF PRIOR APPLICATIONS BY STATE OR UNITED STATES OR OFFICER OR AGENCY THEREOF.

(1) (a) In order to acquire the right to use any unappropriated public water in this state, any person who is a citizen of the United States, or who has filed his declaration of intention to become a citizen as required by the naturalization laws, or any association of citizens or declarants, or any corporation, or the state of Utah by the directors of the divisions of travel development, business and economic development, wildlife resources, and state lands and forestry, or the executive director of the Department of Transportation for the use and benefit of the public, or the United States of America shall make an application in a form prescribed by the state engineer before commencing the construction, enlargement, extension, or structural alteration of any ditch, canal, well, tunnel, or other distributing works, or performing similar work tending to acquire such rights or appropriation, or enlargement of an existing right or appropriation.

(b) The application shall be upon a form to be furnished by the state engineer and shall set forth:

(i) the name and post office address of the person, corporation, or association making the application;

(ii) the nature of the proposed use for which the appropriation is intended;

(iii) the quantity of water in acre-feet or the flow of water in second-feet to be appropriated;

(iv) the time during which it is to be used each year;

(v) the name of the stream or other source from which the water is to b diverted;

(vi) the place on the stream or source where the water is to be diverte and the nature of the diverting works;

(vii) the dimensions, grade, shape, and nature of the proposed divertir channel; and

(viii) other facts that clearly define the full purpose of the propos appropriation.

(2) (a) In addition to the information required in Subsection (1)(b), if the propos use is for irrigation, the application shall show:

(i) the legal subdivisions of the land proposed to be irrigated, with t total acreage thereof; and

(ii) the character of the soil.

(b) In addition to the information required in Subsection (1)(b), if the propos use is for developing power, the application shall show:

(i) the number, size, and kind of water wheels to be employed and head under which each wheel is to be operated;

(ii) the amount of power to be produced;

(iii) the purposes for which and the places where it is to be used; and

(iv) the point where the water is to be returned to the natural stream source.

(c) In addition to the information required in Subsection (1)(b), if the propo use is for milling or mining, the application shall show:

(i) the name of the mill and its location or the name of the mine and mining district in which it is situated;

(ii) its nature; and

(iii) the place where the water is to be returned to the natural strean source.

(d) (i) The point of diversion and point of return of the water shal

designated with reference to the United States land survey corners, mineral monuments or permanent federal triangulation or traverse monuments, when either the point of diversion or the point of return is situated within six miles of the corners and monuments.

(ii) If the point of diversion or point of return is located in unsurveyed territory, the point may be designated with reference to a permanent, prominent natural object.

(iii) The storage of water by means of a reservoir shall be regarded as a diversion, and the point of diversion in those cases is the point where the longitudinal axis of the dam crosses the center of the stream bed.

(iv) The point where released storage water is taken from the stream shall be designated as the point of rediversion.

(v) The lands to be inundated by any reservoir shall be described as nearly as may be, and by government subdivision if upon surveyed land. The height of the dam, the capacity of the reservoir, and the area of the surface when the reservoir is filled shall be given.

(vi) If the water is to be stored in an underground area or basin, the applicant shall designate, with reference to the nearest United States land survey corner if situated within six miles of it, the point of area of intake, the location of the underground area or basin, and the points of collection.

(e) Applications for the appropriation of water filed prior to the enactment of this title, by the United States of America, or any officer or agency of it, or the state of Utah, or any officer or agency of it, are validated, subject to any action by the state engineer.

UCA § 73-3-3 PERMANENT OR TEMPORARY CHANGES IN POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE.

(1) For purposes of this section:

(a) "Permanent changes" means changes for an indefinite length of time with an intent to relinquish the original point of diversion, place of use, or purpose of use.

(b) "Temporary changes" means changes for fixed periods not exceeding one year.

(2) **(a)** Any person entitled to the use of water may make permanent or temporary changes in the:

(i) point of diversion;

(ii) place of use; or

(iii) purpose of use for which the water was originally appropriated.

(b) A change may not be made if it impairs any vested right without compensation.

(3) Both permanent and temporary changes of point of diversion, place of use purpose of use of water, including water involved in general adjudication or o suits, shall be made in the manner provided in this section.

(4) **(a)** A change may not be made unless the change application is approve the state engineer.

(b) Applications shall be made upon forms furnished by the state engineer shall set forth:

(i) the name of the applicant;

(ii) a description of the water right;

(iii) the quantity of water;

(iv) the stream or source;

(v) the point on the stream or source where the water is diverted;

(vi) the point to which it is proposed to change the diversion water;

(vii) the place, purpose, and extent of the present use;

(viii) the place, purpose, and extent of the proposed use; and

(ix) any other information that the state engineer requires.

(5) **(a)** The state engineer shall follow the same procedures, and the righ duties of the applicants with respect to applications for permanent c of point of diversion, place of use, or purpose of use shall be the sa provided in this title for applications to appropriate water.

(b) The state engineer may, in connection with applications for per change involving only a change in point of diversion of 660 feet waive the necessity for publishing a notice of application.

(6) **(a)** The state engineer shall investigate all temporary change applications.

(b) If the state engineer finds that the temporary change will not impair any vested rights of others, he shall issue an order authorizing the change.

(c) If the state engineer finds that the change sought might impair vested rights, before authorizing the change, he shall give notice of the application to any person whose rights may be affected by the change.

(d) Before making an investigation or giving notice, the state engineer may require the applicant to deposit a sum of money sufficient to pay the expenses of the investigation and publication of notice.

(7) **(a)** The state engineer may not reject applications for either permanent or temporary changes for the sole reason that the change would impair the vested rights of others.

(b) If otherwise proper, permanent or temporary changes may be approved for part of the water involved or upon the condition that conflicting rights are acquired.

(8) **(a)** Any person holding an approved application for the appropriation of water may either permanently or temporarily change the point of diversion, place of use, or purpose of use.

(b) A change of an approved application does not:

(i) affect the priority of the original application; or

(ii) extend the time period within which the construction of work is to begin or be completed.

(9) Any person who changes or who attempts to change a point of diversion, place of use, or purpose of use, either permanently or temporarily, without first applying to the state engineer in the manner provided in this section:

(a) obtains no right;

(b) is guilty of a crime punishable under Section 73-2-27 if the change or attempted change is made knowingly or intentionally; and

(c) is guilty of a separately punishable offense for each day of the unlawful change.

(10) **(a)** This section does not apply to the replacement of an existing well by a new well drilled within a radius of 150 feet from the point of diversion of the existing well.

(b) Any replacement well must be drilled in accordance with the requireme of Section 73-3-28.

(11) **(a)** In accordance with the requirements of this section, the Division Wildlife Resources or Division of Parks and Recreation may applications for permanent or temporary changes for the purpose providing water for instream flows, within a designated section of a nat stream channel or altered natural stream channel, necessary within the s for:

(i) the propagation of fish;

(ii) public recreation; or

(iii) the reasonable preservation or enhancement of the natural str environment.

(b) Applications may be filed for changes on:

(i) perfected water rights presently owned by the respective divisior

(ii) perfected water rights purchased by the respective division fo purpose of providing water for instream flows, through fur provided for that purpose by legislative appropriation or acquir lease, agreement, gift, exchange, or contribution; or

(iii) appurtenant water rights acquired with the acquisition of property by either division.

(c) A physical structure or physical diversion from the stream is not requi implement a change for instream flow use.

(d) This Subsection (11) does not allow enlargement of the water right s to be changed nor may the change impair any vested water right.

(e) In addition to the other requirements of this section, an application fi either division shall:

(i) set forth the legal description of the points on the stream b which the necessary instream flows will be provided by the c and

(ii) include appropriate studies, reports, or other information requ the state engineer that demonstrate the necessity for the ir flows in the specified section of the stream and the projected b to the public that will result from the change.

(f) The Division of Wildlife Resources and Division of Parks and Recreation may:

(i) purchase water rights for the purposes provided in Subsection (11)(a) only with funds specifically appropriated by the Legislature for water rights purchases; or

(ii) accept a donated water right without legislative approval.

(g) This Subsection (11) does not authorize either division to:

(i) appropriate unappropriated water under Section 73-3-2 for the purpose of providing instream flows; or

(ii) acquire water rights by eminent domain for instream flows or for any other purpose.

(h) This Subsection (11) applies only to change applications filed on or after April 28, 1986.

(12) (a) Sixty days before the date on which proof of change for instream flows under Subsection (11) is due, the state engineer shall notify the applicant by registered mail or by any form of electronic communication through which receipt is verifiable of the date when proof of change is due.

(b) Before the date when proof of change is due, the applicant must either:

(i) file a verified statement with the state engineer that the instream flow uses have been perfected, which shall set forth:

(A) the legal description of the points on the natural stream channel or altered natural stream channel between which the necessary instream flows have been provided;

(B) detailed measurements of the flow of water in second feet changed;

(C) the period of use; and

(D) any additional information required by the state engineer; or

(ii) apply for a further extension of time as provided for in Section 73-3-12.

(c) Upon approval of the verified statement required under Subsection (12)(b)(i), the state engineer shall issue a certificate of change for instream flow use.

UCA § 73-3-10 APPROVAL OR REJECTION OF APPLICATION.

(1) When the approval or rejection of an application is decided, a record of the decision shall be made in the state engineer's office.

(2) The state engineer's decision shall be mailed to the applicant.

(3) If the application is approved, the applicant shall be authorized upon receipt of the decision to:

(a) proceed with the construction of the necessary works;

(b) take any steps required to apply the water to the use named in the application; and

(c) perfect the proposed application.

(4) If the application is rejected, the applicant shall take no steps toward the prosecution of the proposed work or the diversion and use of the public water under the application.

(5) The state engineer shall state in any decision approving an application the time within which the construction work must be completed and the water applied to beneficial use.

UCA § 73-3-11. STATEMENT OF FINANCIAL ABILITY OF APPLICANTS.

Before either approving or rejecting an application the state engineer may require such additional information as will enable him properly to guard the public interests, and may require a statement of the following facts: In case of an incorporated company, he may require the submission of the articles of incorporation, the names and places of residence of its directors and officers, and the amount of its authorized and its paid-up capital. If the applicant is not a corporation, he may require a showing as to the names of the persons proposing to make the appropriation and a showing of facts necessary to enable him to determine whether or not they are qualified appropriators and have the financial ability to carry out the proposed work, and whether or not the application has been made in good faith.

UCA § 73-3-12. TIME LIMIT ON CONSTRUCTION AND APPLICATION TO BENEFICIAL USE — EXTENSIONS — PROCEDURES AND CRITERIA.

(1) As used in this section, "public agency" means a public water supply agency of:

(a) the state; or

(b) a political subdivision of the state.

(2) **(a)** The construction of the works and the application of water to beneficial use shall be diligently prosecuted to completion within the time fixed by the state engineer.

(b) Extensions of time, not exceeding 50 years from the date of approval of the application, except as provided in Subsection (2)(c), may be granted by the state engineer on proper showing of diligence or reasonable cause for delay.

(c) Additional extensions of time, beyond 50 years, may be granted by the state engineer on applications held by any public agency, if the public agency can demonstrate the water will be needed to meet the reasonable future requirements of the public.

(d) All requests for extension of time shall be made by signed statement and shall be filed in the office of the state engineer on or before the date fixed for filing proof of appropriation.

(e) Extensions not exceeding 14 years after the date of approval may be granted by the state engineer upon a sufficient showing by signed statement, but extensions beyond 14 years shall be granted only after application and publication of notice.

(f) **(i)** The state engineer shall publish a notice of the application once a week for two successive weeks, in a newspaper of general circulation, in the county in which the source of the water supply is located and where the water is to be used.

(ii) The notice shall:

(A) state that an application has been made; and

(B) specify where the interested party may obtain additional information relating to the application.

(g) Any person who owns a water right from the source of supply referred to in Subsection (2)(f) or holds an application from that source of supply may file a protest with the state engineer:

(i) within 20 days after the notice is published, if the adjudicative proceeding is informal; and

(ii) within 30 days after the notice is published, if the adjudicative proceeding is formal.

(h) In considering an application to extend the time in which to place water t beneficial use under an approved application, the state engineer shall den the extension and declare the application lapsed, unless the applica affirmatively shows that the applicant has exercised or is exercisin reasonable and due diligence in working toward completion of th appropriation.

(i) **(i)** If reasonable and due diligence is shown by the applicant, the sta engineer shall approve the extension.

(ii) The approved extension is effective so long as the applica continues to exercise reasonable diligence in completing th appropriation.

(j) The state engineer shall consider the holding of an approved application any public agency to meet the reasonable future requirements of the pub to be reasonable and due diligence within the meaning of this section f the first 50 years. The state engineer may approve extensions beyond years for a public agency, if the agency provides information sufficient demonstrate the water will be needed to meet the reasonable futu requirements of the public.

(k) If the state engineer finds unjustified delay or lack of diligence prosecuting the works to completion, the state engineer may deny extension or may grant the request in part or upon conditions, includin reduction of the priority of all or part of the application.

(3) **(a)** Except as provided in Subsections (3)(b) and (c), an application upon wh proof has not been submitted shall lapse and have no further force or eff after the expiration of 50 years from the date of its approval.

(b) If the works are constructed with which to make beneficial use of the w applied for, the state engineer may, upon showing of that fact, gr additional time beyond the 50-year period in which to make proof.

(c) An application held by a public agency to meet the reasonable fu requirements of the public, for which proof of appropriation has not b submitted, shall lapse, unless extended as provided in Subsection (2)(j).

UCA § 73-3-16. PROOF OF APPROPRIATION OR PERMANENT CHANGE — NOTICE MANNER OF PROOF — STATEMENTS — MAPS, PROFILES, DRAWINGS — VERIFICATION — WAIVER OF FILING — STATEM IN LIEU OF PROOF OF APPROPRIATION OR CHANGE.

(1) Sixty days before the date set for the proof of appropriation or proof of chang

be made, the state engineer shall notify the applicant by mail when proof of completion of the works and application of the water to a beneficial use will be due.

(2) On or before the date set for completing the proof in accordance with the application, the applicant shall file proof with the state engineer on forms furnished by the state engineer.

(3) Except as provided in Subsection (4), the applicant shall submit the following information:

(a) a description of the works constructed;

(b) the quantity of water in acre-feet or the flow in second-feet diverted, or both;

(c) the method of applying the water to beneficial use; and

(d) (i) detailed measurements of water put to beneficial use;

(ii) the date the measurements were made; and

(iii) the name of the person making the measurements.

(4) (a) On applications filed for appropriation or permanent change of use of water to provide a water supply for state projects constructed pursuant to Title 73, Chapter 10, Board of Water Resources - Division of Water Resources, or for federal projects constructed by the United States Bureau of Reclamation for the use and benefit of the state, any of its agencies, its political subdivisions, public and quasi-municipal corporations, or water users' associations of which the state, its agencies, political subdivisions, or public and quasi-municipal corporations are stockholders, the proof shall include:

(i) a statement indicating construction of the project works has been completed;

(ii) a description of the major features with appropriate maps, profiles, drawings, and reservoir area-capacity curves;

(iii) a description of the point or points of diversion and rediversion;

(iv) project operation data;

(v) a map showing the place of use of water and a statement of the purpose and method of use;

(vi) the project plan for beneficial use of water under the applications

and the quantity of water required; and

(vii) a statement indicating what type of measuring devices have bee installed.

(b) The director of the Division of Water Resources shall sign proofs for tl state projects and an authorized official of the Bureau of Reclamation sha sign proofs for the federal projects specified in Subsection (4)(a).

(5) The proof on all applications shall be sworn to by the applicant or the applican appointed representative and proof engineer.

(6) **(a)** Except as provided in Subsection (6)(b), when filing proof, the applica shall submit maps, profiles, and drawings made by a Utah licensed la surveyor or Utah licensed professional engineer that show:

(i) the location of the completed works;

(ii) the nature and extent of the completed works;

(iii) the natural stream or source from which and the point where t water is diverted and, in the case of a nonconsumptive use, the po where the water is returned; and

(iv) the place of use.

(b) The state engineer may waive the filing of maps, profiles, and drawing in the state engineer's opinion the written proof adequately describes works and the nature and extent of beneficial use.

(7) The completed proof shall conform to rules and standards established by the s engineer.

(8) In those areas in which general determination proceedings are pending, or h been concluded, under Title 73, Chapter 4, Determination of Water Rights, state engineer may petition the district court for permission to:

(a) waive the requirements of this section and Section **73-3-17**; and

(b) permit each owner of an application to file a verified statement to the el that the applicant has completed the appropriation or change and elect file a statement of water users claim in the proposed determination of w rights or any supplement to it in accordance with Title 73, Chapte Determination of Water Rights, in lieu of proof of appropriation or proc change.

UCA § 73-3-17. CERTIFICATE OF APPROPRIATION — EVIDENCE.

Upon it being made to appear to the satisfaction of the state engineer that an appropriation or a permanent change of point of diversion, place or nature of use has been perfected in accordance with the application therefor, and that the water appropriated or affected by the change has been put to a beneficial use, as required by Section 73-3-16, he shall issue a certificate, in duplicate, setting forth the name and post-office address of the person by whom the water is used, the quantity of water in acre-feet or the flow in second-feet appropriated, the purpose for which the water is used, the time during which the water is to be used each year, the name of the stream or source of supply from which the water is diverted, the date of the appropriation or change, and such other matter as will fully and completely define the extent and conditions of actual application of the water to a beneficial use; provided that certificates issued on applications for projects constructed pursuant to Title 73, Chapter 10, Utah Code Annotated 1953, and for the federal projects constructed by the United States Bureau of Reclamation, referred to in Section 73-3-16 of said Code, need show no more than the facts shown in the proof. The certificate shall not extend the rights described in the application. Failure to file proof of appropriation or proof of change of the water on or before the date set therefor shall cause the application to lapse. One copy of such certificate shall be filed in the office of the state engineer and the other shall be delivered to the appropriator or to the person making the change who shall, within thirty days, cause the same to be recorded in the office of the county recorder of the county in which the water is diverted from the natural stream or source. The certificate so issued and filed shall be prima facie evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights.

UCA § 73-3-20. RIGHT TO DIVERT APPROPRIATED WATERS INTO NATURAL STREAMS — REQUIREMENTS — STORAGE IN RESERVOIR — INFORMATION REQUIRED BY STATE ENGINEER — LAPSE OF APPLICATION.

(1) Upon application in writing and approval of the state engineer, any appropriated water may, for the purpose of preventing waste and facilitating distribution, be turned from the channel of any stream or any lake or other body of water, into the channel of any natural stream or natural body of water or into a reservoir constructed across the bed of any natural stream, and commingled with its waters, and a like quantity less the quantity lost by evaporation and seepage may be taken out, either above or below the point where emptied into the stream, body of water or reservoir. In so doing, the original water in such stream, body of water, or reservoir must not be deteriorated in quality or diminished in quantity for the purpose used, and the additional water turned in shall bear its share of the expense of maintenance of such reservoir and an equitable proportion of the cost of the reservoir site and its construction. Any person having stored his appropriated water in a reservoir for a beneficial purpose shall be permitted to withdraw the water at the times and in the quantities as his necessities may require if the withdrawal does not interfere with the rights of others.

(2) The state engineer may require the owner of record of an approved excha application to provide information concerning the diverting works constructed, extent to which the development under the exchange has occurred, and o information the state engineer considers necessary to insure the exchange is tal place, to establish the owner of the exchange still has a legal interest in underlying water right used as the basis for the exchange, or to arrive at quantity of water being exchanged. This information shall be provided by owner of record of an approved exchange within 60 days of notification by state engineer.

(3) The state engineer may lapse an application made pursuant to this section u the following conditions:

(a) the applicant has lost a legal interest in the underlying right use facilitate the exchange;

(b) the exchange can no longer be carried out as stated in the application;

(c) the applicant has not complied with the conditions established in appr the exchange; or

(d) the applicant fails to provide the information as outlined in Subsectic **3**-20(2).

(DUPLICATE)

CERTIFICATE OF APPROPRIATION OF WATER

STATE OF UTAH

APPLICATION NO. 5095. CERTIFICATE NO. 357.

WEBER RIVER WATER DIVISION

3587

Whereas, *It has been made to appear to the satisfaction of the undersigned, State Engineer of the State of Utah, that the appropriation of water from* a slough *in* Weber *County, made by* Mary E. Marriott, *has been perfected in accordance with the application therefor, received in the office of the State Engineer on the* 8th *day of* March, *19*13 *and recorded on page* 442-444 *in book* I-15 *of the record of applications to appropriate water;* Wherefore, *Be it known that I,* W. D. Beers, *State Engineer of the State of Utah, under and by authority and direction of the provisions of the Compiled Laws of Utah, 1907, as amended by Chapter 62 of the Session Laws of Utah, 1909, and Chapters 3 and 103 of the Session Laws of Utah, 1911, on "Water Rights and Irrigation," do hereby certify that the said* Mary E. Marriott, *of* Ogden, *in* Weber *County, State of* Utah, *is entitled to the use of* five-tenths(.5) of one *cubic feet of water per second, subject to the following restrictions, to-wit:*

The water is diverted at a point which lies 1299 ft. south and 1595 ft. west from the northeast corner of Section 13, Township 6 North, Range 3 West, Salt Lake base and meridian. The water is diverted by means of a pump and conveyed in a ditch, 1550 ft. long, 2 ft. wide on top and 1.5 ft. wide in the bottom, having an effective depth of 1 ft.

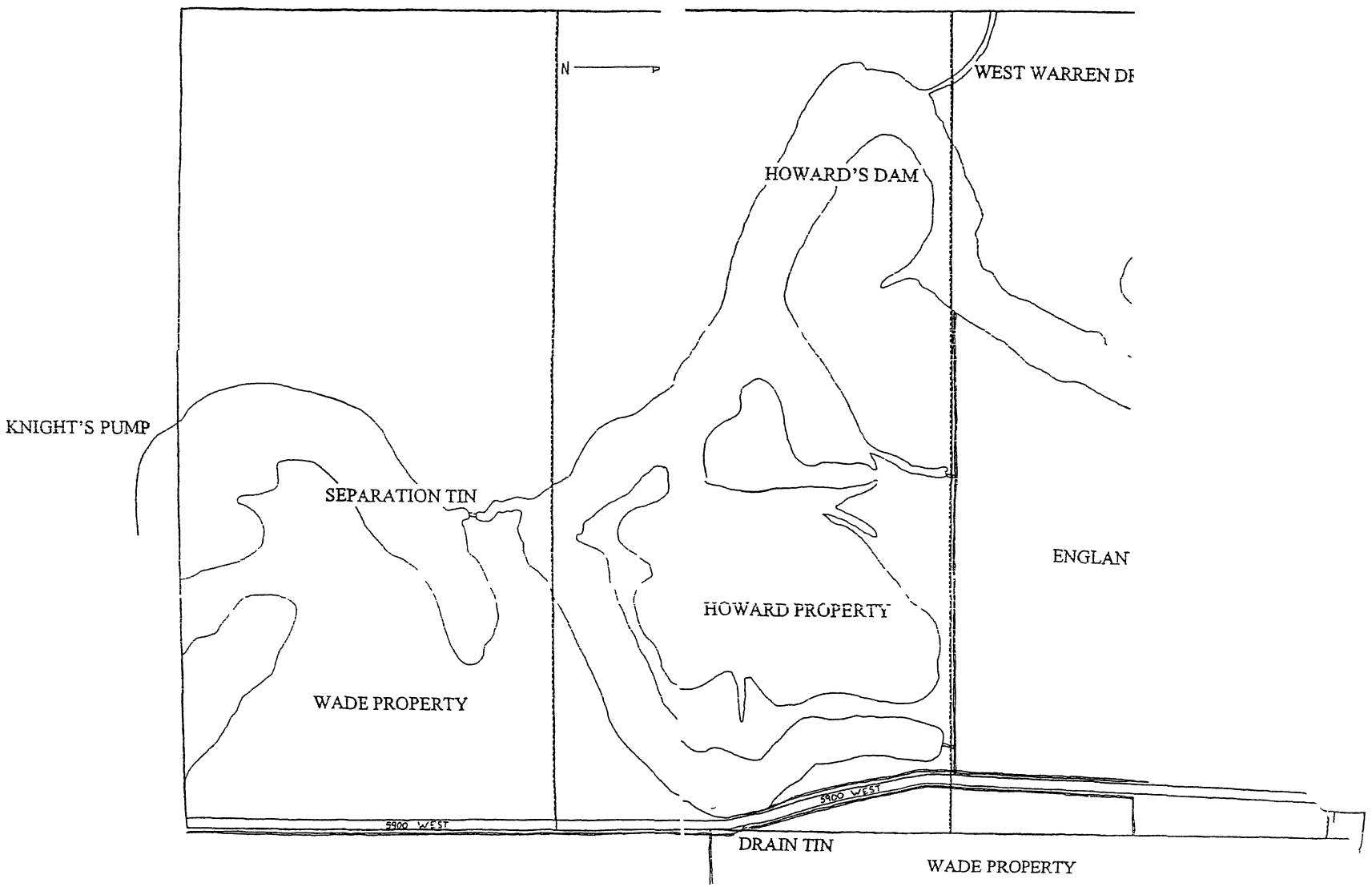
The water is used from May 1 to September 30, inclusive, of each year, to irrigate twenty-five(25) acres of land embraced in the north half of the northeast quarter($N\frac{1}{2}$ $NE\frac{1}{4}$) of Section 13, Township 6 North, Range 3 West, Salt Lake base and meridian, particularly described as follows: Beginning at a point 33 ft. west and 742.5 ft. south from the northeast corner of said Section 13, running thence south 577.5 ft., thence west 1550 ft., thence north 825 ft., thence east 500 ft., thence south 76°44' east 1079 ft. to place of beginning.

This certificate entitles the holder to use five-tenths of a cubic foot of water per second intermittently for the land area described; but, the said holder is not entitled by virtue of this certificate to use to exceed the equivalent of three acre-feet of water per acre of land irrigated per annum.

The diverting works must be maintained in such condition as will prevent an unreasonable loss of water.

The date of the appropriation is March 8, 1913.

In Witness Whereof, *I have hereunto set my hand and affixed the seal of my office this* 14th *day of* April, A.D. 1916.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WEST WARREN DI
HOWARD'S DAM
KNIGHT'S PUMP
SEPARATION TIN
ENGLAN
HOWARD PROPERTY
WADE PROPERTY
5900 WEST
5900 WEST
DRAIN TIN
WADE PROPERTY

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF APPLICATION)
) MEMORANDUM DECISION
35-10520 (A71312))

Application Number 35-10520 (A71312), in the names of Glynn Wayment and Edward Wayment was filed on December 30, 1997, to appropriate 260.0 acre-feet of water from the Marriott Slough, located South 1299 feet and West 1595 feet from the NE Corner of Section 13, T6N, R3W, SLB&M, to be used for supplemental irrigation of 90.00 acres from April 1 to October 31.

The application was advertised in The Ogden Standard-Examiner on January 15, 1998, and January 22, 1998, and was protested by Knight Irrigation Company et al, and Howard, Lee Howard and William Howard. A hearing was held on January 21, 1999 in Ogden, Utah.

The applicant explained that this application is intended to re-use water that runs off of upper fields that collects in the Marriott Slough. The water is to be used with Water Right Number 35-8073 which allows irrigation of 25 acres. The protestants believe that their Existing water rights would be impaired by this appropriation.

After review of the application, the protests, water right records, and hydrologic data for the area, it is the opinion of the State Engineer that sufficient unappropriated water to satisfy this application is not available. After water appropriated in the Marriott Slough (or Little Weber Creek), it looses its unique status as water which may have been appropriated and used by the applicant and is the source of supply for other rights on the Marriott Slough.

It is therefore, ORDERED and Application Number 35-10520 (A71312) is hereby DENIED.

This decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953 which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this decision. However, a Request for Reconsideration is not a prerequisite to a district court appeal. A court appeal must be filed within 30 days after the date of this decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 26th day of February, 1999.

Robert L. Morgan

Robert L. Morgan, P.E., State Engineer

Mailed a copy of the foregoing Memorandum Decision this 26th day of February, 1999, to:

Glynn Wayment
961 North 5900 West
Ogden, UT 84404

Edward England
5730 West 950 North
Ogden, UT 84404

Steven E. Clyde
201 South Main Street, Suite 1000
Salt Lake City, UT 84111-2208

Knight Irrigation Company et al
c/o Guy Jones
6309 West 900 South
Ogden, UT 84404

Roger, Lee, and William Howard
c/o J. Craig Smith
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

E. Blaine Johnson
1615 E. Shadow Valley Drive
Ogden, UT 84403

BY: Eileen Tooke
Eileen Tooke, Secretary

Steven E. Clyde (Bar No. 0686)
Reagan L. Brenneman (Bar No. 7823)
CLYDE SNOW SESSIONS & SWENSON, P.C.
201 South Main Street, Suite 1300
Salt Lake City, Utah 84111-2208
Telephone: (801) 322-2516

Attorneys for Applicants

RECEIVED
MAR 17 1999
WATER RIGHTS
SALT LAKE

BEFORE THE STATE ENGINEER, DIVISION OF WATER RIGHTS

UTAH DEPARTMENT OF NATURAL RESOURCES

IN RE: APPLICATION TO APPROPRIATE A71312 (35-10520)	REQUEST FOR RECONSIDERATION

Appropriation applicants Glynn Wayment and Edward England (collectively applicants"), by and through their counsel, Steven E. Clyde and Reagan L. Brenneman of Clyde Snow Sessions & Swenson, do hereby respectfully submit this Request for Reconsideration of State Engineer Memorandum Decision dated February 26, 1999. This request is authorized under Sections 73-3-14 and 63-46b-13 of the Utah Code Annotated, and Rule 655-6-17 of the Utah Administrative Code.

INTRODUCTION

On December 30, 1997, Applicants Glynn Wayment and Edward England filed to appropriate 260 acre feet of water, pumped at a 10 c.f.s. maximum intermittent flow rate, from Marriott Slough for irrigation of 90 acres and sole supply of 65 acres. Applicants proposed to divert this water by means of a pump flume and waste water collection ditch.

Protestants to this application included Lonn Knight, Paul H. Knight, Michael P. Quayle, Larry Wade, Alma Knight, Richard A. Knight, G. Guy Jones, Kathleen J. Hansen, Richard F. Hansen, the Knight Irrigation Company, and Lee, Roger and William Howard.[1] Essentially, these parties argued that there is no unappropriated water in the source, the proposed use would impair existing rights, and the application would unreasonably affect public recreation and the natural stream environment.

On January 21, 1999, a hearing was held on this matter. On February 26, 1999, the State Engineer issued its decision denying the application based on its opinion that there is not sufficient unappropriated water in the source to satisfy the application. The State Engineer also stated in the Memorandum Decision that "[a]fter water collects in Marriott Slough (or Little Weber Creek), it loses its unique identity as water which may have been appropriated and used by the applicant and becomes the source of supply for other rights on the Marriott Slough." Memorandum Decision, February 26, 1999.

Essentially, that water which applicants seek to appropriate is imported, or foreign, wat from the Weber River which would not have found its way to the Marriott Slough but for irrigation practices on applicants' lands and lands neighboring applicants' lands. The slough separate and distinct drainage; importantly, the Weber River, the source of origin, is not tribu to the slough. Therefore, the water applicants seek to appropriate is that which runs off applicants' other lands and is collected in the slough and is not naturally in the system. Accordingly, protestants have no call on that water.

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[1]Basin Land & Livestock also filed a late protest, submitted just days before the hea Applicants continue to assert that this late protest should not be considered by the State En in issuing its decision in this matter.

In fact, the situation is analogous to that in *Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1992), wherein the irrigation company diverted from the Escalante River and Steed diverted from Alvey Wash. The Utah Supreme Court held that the Escalante River was not naturally tributary to Alvey Wash, and therefore any irrigation seepage and waste water reaching the Wash was not return flow water but only waste or foreign waters and that Steed, as the downstream appropriator did not have a vested right as against the upstream irrigators to force them to continue wasting water for Steed's benefit. Thus, where the Application to Appropriate meets the requirements of the Water Code, Title 73 of the Utah Code Ann. ("U.C.A."), and approval of the application would be consistent under *Steed*, Applicant submits this Request for Reconsideration asking the State Engineer to approve this application.

REASONS FOR APPROVAL

I. Under *Steed*, This Application Should Be Approved Where Applicants Seek to Appropriate Waste and Seepage Water, Used on Their and Neighboring Lands, Imported from the Original Source of the Weber River, Which Is Non-tributary to the Marriott Slough, and To Which Protestants Have No Call.

Applicants seek to appropriate waste or seepage water, originally diverted from the Weber River, and which has found its way into Marriott Slough. This water is foreign water in the slough and is subject to appropriation and use by application. Specifically, the water at issue constitutes seepage or waste water that drains from irrigation practices on Applicants' land and neighboring lands into Marriott Slough. Because the Weber River is not naturally tributary to Marriott Slough, this water is foreign to the slough and is subject to recapture and reuse by the original appropriator. Under Utah law, these waters are available for appropriation.

This situation is analogous with *Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223, 1227 (Utah 1992) (tracing case law on rights of water users in runoff and seepage waters), and thus, this application should be approved. Under *Steed*, a water user has the right to use his water to the fullest extent possible and is allowed to recapture that water while it is on his property and before it co-mingles with the source of origin. 846 P.2d at 1226. *See also* 2 Robert E. Beck, et al., *Waters and Water Rights* § 13.04, at 150, 152-53 (1991). No downstream junior appropriator has any vested right to demand or require that the upstream user waste water even to maintain historic seepage or run-off flows where the water has not commingled with the source of origin. Id.

Specifically, *Steed* involved an irrigation company that had historically diverted water from the Escalante River to its shareholders' lands through open canals. 846 P.2d at 1224. In turn, the shareholders flood-irrigated their lands. Id. Some of this irrigation water drained from the shareholders' lands in the form of runoff and seepage water into Alvey Wash, where it commingled with the natural flow in the wash. Id. Importantly, the Escalante River does not naturally contribute any water to the Alvey Wash. Id.

Ultimately, New Escalante changed its irrigation system from flood to sprinkler systems In so doing, the efficient new system substantially diminished runoff and seepage flows that previously fed into Alvey Wash. Id.

The estate of Steed owned a decreed water right in Alvey Wash. It argued that it had a vested right to receive historic amounts of runoff and seepage flow to the wash. Id. To the contrary, however, the trial court found that "because there was no natural contribution of wa from the Escalante River to the wash, Steed had acquired no vested right, either by appropria by adverse use, or otherwise" to compel New Escalante to continue to let historic amounts of

water run off or seep from its shareholders' lands into the wash. Id. (as interpreted and represented by appellate court).

The Utah Supreme Court of Appeals upheld this ruling. In its analysis, it traced the relevant case law from *Garns v. Rollins*, 41 Utah 260, 125 P 867 (1912) (holding upstream landowner had absolute right to all waste water she could capture before it ran off her land), *accord Stookey v Green*, 53 Utah 311, 178 P. 586 (1919) (runoff, waste and seepage are not subject to appropriation as against owner of irrigated land who desires to recapture and apply it on his land), and *Smithfield West Bench Irrigation Co v Union Central Life Insurance Co*, 105 Utah 468, 142 P.2d 866 (1943) (holding "if original appropriator has a beneficial use for such waters he may again reuse then and no one can acquire a right superior to that of the original appropriator.") to *Lasson v. Seely*, 120 Utah 679, 238 P 2d 418 (1951) (holding "plaintiff cannot compel defendant or others to waste water nor to forego a water turn to build up the flow of Panawats slough . . .") and *McNaughton v Eaton*, 121 Utah 394, 242 P.2d 570 (1952) (warning appropriator acquired no rights as against original appropriator to have waste water continue to escape to wash) 846 P.2d at 1224-26

Although the court noted two exceptions from this clear string of precedent, the court found that the exceptions did not alter the rule in the given circumstances. For example, in *East Bench Irrigation Co. v. Deseret Irrigation Co.*, 2 Utah 2d 170, 271 P.2d 449 (1954), that court held that the rule of recapture and reuse did not apply when runoff or waste water returned to stream of origin. [Return flow.] Id. at 1226 (citing *East Bench Irrigation Co.*). Similarly, in *Ercanbrack*, 13 Utah 2d 45, 368 P.2d 461 (1962), that court declined to apply the rule irrigation water that had commingled with water in the natural water table, which caused it to

lose its identity as irrigation water. Id. Ultimately, the *Steed* Court found that those two scenarios were not present in Alvey Wash.

Finally, the *Steed* Court emphasized Utah's strong policy promoting water conservation. As an example, the court relied upon *Big Cottonwood Tanner Ditch Co. v. Moyle*, 109 Utah 213, 174 P.2d 148 (1946). In that case, the court had upheld an irrigation company's right to waterproof its ditches to prevent seepage, even though that seepage had historically supported foliage along the ditch banks of properties servient to the ditch easement. Id. at 1228 (citing *Big Cottonwood Tanner Ditch Co.*). Thus, "in the interest of conservation, an irrigation company was allowed to capture its seepage even though the seepage was serving a beneficial use in supporting flora along the ditch banks." Id. (citing *Big Cottonwood Tanner Ditch Co.*).

The facts in this case are directly analogous to *Steed*, do not fit the exceptions of *East Bench Irrigation Co.* and *Stubbs*, and support conservation policy. Consequently, the rule of recapture and reuse should apply to this application, and its denial should be reversed. Here, as in *Steed*, applicants seek to capture and reuse irrigation water that has historically been used on their land or flowed or seeped onto their land from neighboring lands. The water at issue here originates from the Weber River. Applicants propose to collect this water in Marriott Slough, also sometimes called the Little Weber River, and use it to irrigate other lands. Importantly, as in *Steed* and like Alvey Wash and the Escalante River, the Weber River is not tributary and does not naturally contribute to the Little Weber River, or Marriott Slough. Thus, Applicants seek to capture and reuse water imported or foreign water. But for the applicants' and neighbors irrigation practices, this water would never reach Marriot Slough. Consequently no downstream user has a call on this water. Undisputably, applicants could legally capture and reuse this irrigation water on their uplands without an appropriation. Distinctly, however, an

appropriation is necessary in this circumstance because the applicants seek to apply the water to irrigate new land.

Just as appropriator *Steed* could not compel New Escalante to continue to waste water, protestants have no vested right to prohibit applicants from recapturing and reusing subject water, especially where some protestants do not even assert valid prior appropriative rights.[2] Allowing the water to continue down into the Marriott Slough without being beneficially used by applicants is contrary to Utah water conservation policy, and contrary to Utah law. Thus, applicants are not precluded, and in fact are entitled, to appropriate this water and beneficially use the same.

II. The Proposed Use Will Not Impair Existing Rights under U.C.A. § 73-3-8 (1) (b).

Certain protestants' rights will not be impaired by this appropriation because those protestants have no vested water right in sub-irrigation waters. Again, an upland user can shut off his irrigation so that the water does not drain to sub-irrigated fields, and the lower user would have no recourse. *See Steed*, 846 P.2d 1223 and *Big Cottonwood Tanner Ditch*, 174 P.2d 148.

Where protestants have no vested water rights in maintaining a high water table, this application can cause no impairment to protestants. At the hearing on this matter, Protestants failed to offer evidence of any impairment, relying instead only on speculative allegations. Applicants acknowledge that this appropriation will be conditioned by the no impairment rule

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[2]In *Steed*, the downstream user even had a decreed water right to the seepage and runoff in Alvey Wash; the court held nevertheless that the user had no call on the Escalante, or original source, and could therefore not force the upland user to waste water.

and they maintain that no prior rights will be affected because the water is imported waste water and is subject to reuse and reappropriation.

Moreover, at the hearing, every witness testified that changing land use and irrigation practices had reduced water in the slough. Although there may be less water now than historically in the slough, the reduction is not a result of applicants' activities, and applicants should not be penalized for the reduction where they have a clear right under Utah law to use the water at issue.

Finally, protestants own expert, Don Barnett, testified that the Weber River is not tributary to the Little Weber River, or Marriott Slough. Thus, protestants cannot have a call on this water because it has been imported into the system, and applicants therefore have every right to appropriate it.

CONCLUSION

Again, this application meets the requirements for approval of Applications to Appropriate. Therefore, the State Engineer should reconsider and should approve this application.

Finally, applicants incorporate and affirm all arguments asserted in their earlier answer to protests and at the hearing on this matter.

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

GLYNN F. WAYMENT and
EDWARD C. ENGLAND,
Plaintiffs,

vs

WILLIAM HOWARD and
LEE R. HOWARD,
Defendants.

DECISION

Case: 010903790
Judge: W. Brent West
Clerk : Pamela Allen

The Defendants' Motion for Partial Summary Judgment is denied. The motion is denied for several reasons.

First, there are numerous minor and major disputed issues of material facts. The Court does not intend to list or itemize all the disputed facts. In a motion for summary judgment, it is not the Court's role to sort through and sift out all the facts that are "thrown at it" to determine which facts are disputed and which are not. That role occurs, during a trial, when the Court acts as the fact finder. A motion for summary judgment is appropriate in a situation where both parties agree on the material relevant facts and the only thing the Court has to do is determine the legal significance or consequences of those undisputed facts. Suffice it to say, summary judgment is generally not appropriate in a situation where both sides list their own "allegedly undisputed facts" and those lists don't coincide. Nor, is summary judgment applicable

in situations where the moving party lists undisputed facts and the responding party agrees with some or a few of those facts and then submits its own lists of facts, which is then responded to by the moving party, who then agrees or disagrees in whole or in part with those new alleged facts. Both of these situations occur here.

Secondly, while the Defendants' accurately analyze the concept of *res judicata* and its components: *issues preclusion* and *collateral estoppel*, their application of that analysis to the Plaintiffs first and second cause of action misses the mark. The issues in *The Matter of Application No 35-10520 (A71312)* dealt with Plaintiffs request to appropriate irrigation runoff water that was **in addition (emphasis added)** to the water rights they already own. In their first two causes of action, the Plaintiffs allege that the Defendants interfered with their existing water rights by unilaterally building a dam and drainage pipes that significantly altered the method by which the Plaintiffs have utilized their existing water rights for years. Admittedly, some of the administrative law judge's findings may constitute *res judicata*, but the ultimate finding that the Plaintiffs are not entitled to additional water rights does not bar the Plaintiffs claim that the Defendants have interfered with their existing water rights.

Third, there is a dispute on the legal definition of what constitutes the Plaintiffs' water rights. Normally, this would be an appropriate issue for a motion for summary judgment, but, in this instance, there are insufficient facts for the Court to make this legal determination. The Defendants claim that their interference is irrelevant because the Plaintiffs still receive the same amount of water that they are entitled to use and thus suffer no damages. On the other hand,

Plaintiffs claim that the method of obtaining their water is an integral part of their water right. They allege that their water right is premised on the pumping and filling cycle of the slough.

Finally, the Defendants allege that the Plaintiffs have not suffered any damages from the Defendants alleged interference with their water right and, thus, the Plaintiffs' claim is moot. However, the fact that the Plaintiffs have taken steps to mitigate or avoid damages by obtaining additional or supplemental water doesn't make their claim disappear or become moot.

Other issues have been raised in the motion for summary judgment, but are not addressed here. These issues include the historical amounts of water used, the seasonal nature of the water in the slough, etc. All these issues are reserved and can be raised again at the time of trial.

Plaintiffs' counsel will please prepare an Order consistent with this Ruling.

Dated this 8th day of July, 2002.

Judge W. Brent West
Second District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Decision to the parties as follows:

J. Craig Smith
D. Scott Crook
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City Ut 84111

John H. Mabey
David C. Wright
265 East 100 South Suite 300
Salt Lake City Ut 84111

Dated this 8th day of July, 2002.

Deputy Clerk

SECOND DISTRICT COURT - OGDEN COURT
WEBER COUNTY, STATE OF UTAH

GLYNN F WAYMENT Et al, Plaintiff,	:	MINUTES HEARING ON MOTION
vs.	:	Case No: 010903790 WA
WILLIAM HOWARD Et al, Defendant.	:	Judge: W. BRENT WEST Date: October 29, 2003

Clerk: pama

PRESENT

Plaintiff(s): GLYNN F WAYMENT
EDWARD C ENGLAND
Defendant(s): WILLIAM HOWARD
LEE R HOWARD
Plaintiff's Attorney(s): JOHN H JR MABEY
DAVID C WRIGHT
Defendant's Attorney(s): D SCOTT CROOK
J CRAIG SMITH

Video
Tape Number: W10-29-03 Tape Count: 3:40

HEARING

After hearing from the parties the Court finds that it can not resolve this case on a Motion for Summary Judgment and denies the Motion.
Case continued to trial.
Witness lists to be exchanged by 11-10-03. Attorney Wright to prepare an order of todays ruling for the Courts signature.

712

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Attorneys for Plaintiffs

STATE OF UTAH
IN THE SECOND DISTRICT COURT OF WEBER COUNTY

GLYNN F. WAYMENT and EDWARD C. ENGLAND, Plaintiffs, vs. WILLIAM HOWARD and LEE R. HOWARD, Defendants.	:	**ORDER DENYING SUMMARY JUDGMENT** Civil No. 010903790 Judge W. Brent West

Defendants' Motion for Partial Summary Judgment was argued on October 29. Plaintiffs were represented by David C. Wright and John H. Mabey, Jr. Defendants were represented by J. Craig Smith and Scott Crook. Having reviewed the memoranda, affidavits and other papers submitted in support of and in opposition to the motion, and considering the arguments of counsel, the court concludes that there are disputed factual issues that prevent summary judgment. It is therefore

Ordered that defendant's motion is denied.

November 20th, 2003.

BY THE COURT:

W. Brent West
District Court Judge

Approved as to form:

J. Craig Smith
Scott Crook
Attorneys for defendants

CERTIFICATE OF SERVICE

I certify that on November 3, 2003, I caused to be mailed, postage prepaid, a copy of the foregoing Order Denying Summary Judgment to the following:

J. Craig Smith
Smith Hartvigsen
1150 Eagle Gate Tower
60 East South Temple
Salt Lake City UT 84111

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

GLYNN F. WAYMENT,
EDWARD C. ENGLAND,
Plaintiffs,

vs

WILLIAM HOWARD,
LEE HOWARD,
Defendants.

DECISION

Case No.: 010903790
Judge: W. Brent West
Clerk: Pamela Allen

This has been an extremely difficult case to decide. It has been difficult to decide for a multitude of reasons. First, it has been hotly contested by both sides. Second, the evidence, exhibits, and testimony presented to the Court, for its consideration, were fairly extensive. Third, the issues are important. Historically, water right cases in Utah have important consequences, especially during drought cycles, similar to the one the State of Utah is currently facing. Fourth, this appears to be an issue of first impression. The Court could find no single case that was dispositive of this particular dispute. In fact, the cases submitted, by both sides, supported individual points, made by the parties, but did not resolve the entire case. As a result, there were a large number of water cases that the Court had to read and analyze. Finally, there are equities on both sides.

The Court finds that the Defendants' dike does, in fact, interfere with the Plaintiffs' water

right. (Although the Plaintiffs referred to Defendants' structure as a 'dam' and the Defendants referred to the structure as a 'dike,' the Court finds the word 'dike' to be more descriptive of the structure in this case.) In reaching its factual and legal conclusions, there are several legal principles that this Court finds helpful.

First, the case law supports the fact that the means and methods one uses to appropriate water are legally protected. See *Salt Lake City v. Gardner,* 39 Utah 30 (1911). Although this protection is not absolute, any change must result in the conditions being maintained substantially as they existed at the time of the water appropriation. *East Bench Irrigation Co. v. Deseret Irrigation Co.*, 2 Utah 2d 170 (1954). This means that the Plaintiffs water rights and their method of appropriating that water are protected. The Defendants cannot unilaterally limit or restrict the Plaintiffs use of their appropriated water.

Secondly, parties have vested rights that the quantity of water available for their use shall not be decreased. Lower water appropriators have a right to have water come down the stream in the volume and at the times that it customarily came down before. Again, see *East Bench Irrigation Co. v. Deseret Irrigation Co.*, 2 Utah 2d 170 (1954).

Third, this Court could find no case that would allow one water user to unilaterally regulate the water appropriation of another water user. That type of regulation belongs to the Utah State Water Engineer. See *Lasson v. Seely*, 120 Utah 679 (1951). While the Defendants have a right to be concerned about what they perceive to be the Plaintiffs' abuse or overuse of their appropriated water, Defendants do not have the right to regulate the Plaintiffs' flow of

water, even if the Defendants' regulation of Plaintiffs' water is consistent with the Plaintiffs' recorded water right appropriation. This is one of the equities of this case, which creates difficulty for the Court, because the evidence does support a finding that the Plaintiffs may have, at times, been abusing or overusing their water right by flood irrigating more acres than they are entitled to irrigate under their certificate. The difficulty is that the Defendants do not have the right to unilaterally construct a structure that restricts, regulates, or limits Plaintiffs appropriated water. The responsibility to regulate water appropriation belongs to someone else.

Fourth, the Defendants do not have the right to impound unappropriated water that affects Plaintiffs right to use their appropriated water. See *Logan, Hyde Park & Smithfield Canal Co. et al v. Logan City*, 72 Utah 721 (1928). So, again, the Defendants cannot erect a structure, dike or dam, that prohibits, limits, restricts, or regulates Plaintiffs' water without the permission of the Utah State Water Engineer. See *Lasson v. Seely*, 120 Utah 679 (1951).

Finally, although no one particular case this Court has reviewed, is totally dispositive, the case of *Lasson v. Seely*, 120 Utah 679 (1951), has a remarkably similar fact pattern. In *Lasson,* the Defendant built a dam, in a slough, that allegedly deprived the Plaintiff landowner of water for irrigation of his fields. This is basically what occurred in this case. Furthermore, in *Lasson,* the Utah Supreme Court enjoined the Defendant from building a dam unless he acquired approval from the Utah State Water Engineer.

This case is further complicated by the fact that the Court finds that this entire situation has been aggravated by the Defendants' failure to dredge their property. There is nothing wrong

or inappropriate about the Defendants failure to dredge, but their failure to dredge, when the Plaintiffs did dredge their property, affected the slough and how it naturally operated. The Defendants cannot compensate for their failure to dredge, by building a dike, that again changes the natural operation of the slough to the detriment of the Plaintiffs' water rights. The Defendants can choose not to dredge, but there may be consequences to their failure to do so.

Having found that the Defendants' dike does, in fact, interfere with the Plaintiffs' water rights, the next issue is determining what the appropriate remedy should be. This Court has found legal precedence that would allow this Court to order removal of the dike, deepening of the channel, use of a bigger drainage pipe, or any other appropriate method of restoring the Plaintiffs' water right. See *Adams v. Portage Irrigation Reservoir and Power Co.*, 95 Utah 1 (1957). Because of the benefits that the Defendants receive to their property, from the installation of the dike, this Court is hesitant to order the removal of the entire dike. The primary benefit to the Defendants is that the Defendants have greater access to the back parts of their property via the dike. The Court's preference is to order the dike altered so as to allow the traditional flow of water through the dike. This could be accomplished several ways. Deepening the channel and lowering the drain pipe, or, enlarging the drain pipe, or, adding additional drain pipes appear to be both reasonable and feasible alternatives. In addition, the Defendants could dredge the slough on their property equal to the dredging done on the Plaintiffs' property and thus return the entire operation of the slough closer to its original natural state. The Defendants are ordered to modify their dike, by using one of the above described methods, and return the slough, as close as

possible, to its prior natural state and operating condition. The Court admits that there may be other alternatives to modifying the Defendants' dike that may be more reasonable, feasible and economical, than the ones that have been outlined above. If the parties have such alternatives, they have fifteen days, from the date this judgment is signed, by the Court, to submit those alternatives, to the Court, for consideration. The Court further orders the modification of the dike to commence as soon as practicable. In addition, the Defendants are permanently enjoined from any further interference with Plaintiff's water rights. Finally, the Plaintiffs are further awarded their court costs.

Counsel for the Plaintiffs will please prepare Findings of Facts, Conclusions of Law and a Judgment, consistent with this Ruling.

Dated this 26rd day of April, 2004.

W. Brent West

Judge W. Brent West
Second District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Decision to the parties as follows:

John H. Mabey, Jr.
David C. Wright
265 East 100 South #300
Salt Lake City, Ut 84111

J. Craig Smith
D. Scott Crook
215 South State Street #650
Salt Lake City, Ut 84111

Dated this 26th day of April, 2004.

Deputy Clerk

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Attorneys for Plaintiffs

STATE OF UTAH
IN THE SECOND DISTRICT COURT FOR WEBER COUNTY

GLYNN F. WAYMENT and EDWARD C. ENGLAND, Plaintiffs, WILLIAM HOWARD and LEE R. HOWARD Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 010903790 Judge: W. Brent West

This matter was tried to the bench on November 13, 14 and 17, 2003. Plaintiffs were present and represented by John H. Mabey, Jr. and David C. Wright. Defendants were present and represented by J. Craig Smith and Scott Crook.

Having considered the testimonial, documentary and other evidence and the argument of counsel and having personally viewed the subject properties and area in question on November

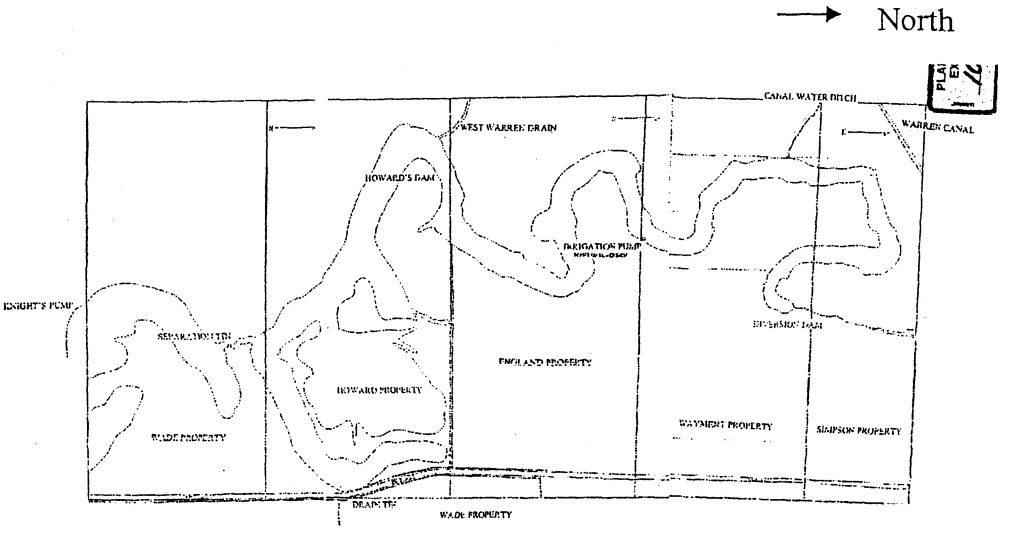
14, and incorporating by reference the court's supplemental Decision of April 26, 2004, the Court hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiffs own water right no. 35-8073, certificated in 1916, consisting of .5 cubic feet per second for irrigation between May 1 and September 30. Specifically, the Certificate permits a flow of .5 cubic feet per second (cfs) of water to irrigate 25 acres of property located in the north half of the northeast quarter of Section 13, Township 6 North, Range 3 West for the period of May 1 to September 30 of each year. Additionally, the Certificate limits the volume of use to 3 acre feet of water per irrigable acre.

2. Plaintiffs' predecessor filed the Proof of Appropriation on April 27, 1915. The water is diverted by way of a pump, flume and ditch.

3. That water right source is a slough, commonly called the Marriot Slough (hereinafter the "slough"). The slough is fed by several tributary sources, including drains, ditches and natural runoff. Although not drawn to scale the following drawing generally illustrates the slough as it passes through the properties of the parties to this claim. The property or slough boundaries are not exact and the boundaries of certain lots are not shown on the map. Additionally, the reference to "Howard's Dam" is actually a reference to the Howard's dike.



4. A dam (referred to as the "diversion dam") on the north end of the slough is used and has always been used to allow the slough to fill so that the water can then be pumped to plaintiffs' crops. After pumping, the slough refills, and then when needed, the pump is turned on for another watering cycle. This process is referred to below as the "pumping and refilling cycle."

5. At the end of the irrigation season, that diversion dam is typically opened so that the slough can drain.

6. The water right Application describes the nature of the slough and how the water was/is obtained. The pumping cycle is described in the Proof of Appropriation.

7. Plaintiffs divert their water from a pump located at a low point on the Wayment property. The slough water flows by gravity to that point and is pumped several feet uphill to reach the Wayment and England properties.

8. This pumping and refilling cycle is how plaintiffs' water right has been used historically and is the means or method by which plaintiffs use their water right and have used their water right.

9. The original appropriator, Mary E. Marriot, explained in her June 10, 1915, letter to the State Engineer how the slough operated when the water right was first approved. She explained that she used the dam at the end of the slough to fill the slough and store water, allowing it to be pumped for irrigation.

10. At the end of the irrigating season, the diversion dam was breached, allowing the slough to empty. That is how the slough and the water right are used today. Plaintiffs' water right cannot be used without this pumping and refilling cycle.

11. During the pumping cycle, plaintiffs pump more than .5 cubic feet per second from the Marriot Slough. The pump plaintiffs use to divert water from the Marriot Slough pumps between 7 to 10 cubic feet per second.

12. Since 1998, plaintiffs have used water from the slough to irrigate land other than the 25 acres of land located in the north half of the northeast quarter of Section 13, Township 6 North, Range 3 West, Salt Lake Base and Meridian (SLBM), identified in the Certificate. Plaintiffs irrigate an approximate total of 115 acres with water diverted from the slough. This water includes the water identified in the Certificate and additional water plaintiffs have added by way of water shares in Warren Irrigation Company and 200 acre feet of water purchased by plaintiff England from Weber Basin Water Conservancy District. All of this water is delivered to the slough and then used by plaintiffs for irrigation.

13. Plaintiffs divert water from the Warren Canal to the slough. Plaintiff Wayment took the matter of using Warren irrigation water on his property to the Warren Irrigation board of directors. The board did not object to that use.

14. The slough is also controlled in part, and has been for many years, by way of a tin located in a ditch that runs parallel to 5900 West. This tin functions, and it or other functionally similar methods have always functioned, as another control device for regulating the level and flow of the slough to allow plaintiffs to irrigate.

15. Benchland Investments LTD owns property located in the northern half of the northeast Section 13, Township 6 North, Range 3 West, SLBM, specifically identified as follows:

> Beginning at a point 2 rods west of the northeast corner of section 13, Township 6 North, Range 3 West, Salt Lake Meridian, U.S. Survey; and running thence south 29 rods thence north 89°46'47" west 146.10 feet, thence south 89°11'08" west 402.61 feet, thence north 87°36'30" west 97.30 feet, more or less, to a fence corner, thence south 0°54'40" west 219.35 feet, thence south 01°20'55" east 44.68 feet, thence south 0°14'26" east 31.47 feet, thence south 0°43'49" west 89.09 feet, thence south 01°48'04" west 199.55 feet, more or less, to a fence corner, thence south 88°48'02" east 295.73 feet, thence south 15 rods, thence west 2255 feet, thence north 80 rods, thence east 158 rods to the place of beginning.

16. Just south of the Giardano Subdivision is a 2.33 acre lot owned by Plaintiff Edward C. England and his wife, Joann E. England, more specifically described as:

> Part of the Northeast Quarter of Section 13, Township 6 North, Range 3 West, Salt Lake Meridian, U.S. Survey: Beginning at a point 2 Rods West and 65 rods south from the northeast corner of said quarter section, running thence north 150 feet, thence west 647.73 feet, thence south 01 deg. 48 min. 04 sec. West 150.00

feet, more or less, to a fence corner, thence south 88 deg. 48 min. 02 sec. east 649.73 feet to the place of beginning. Subject to a right of way of 5900 West Street over east 2 rods.

17. Plaintiff Edward C. England and Joann E. England also own property located in the northern half of the northeast quarter Section 13, Township 6 North, Range 3 West, SLBM, specifically identified as follows:

> The south half of the northeast quarter of section 13, Township 6 North, Range 3 West, Salt Lake Meridian, U.S. Survey. Less that portion of Roadway thereon, heretofore sold and conveyed to Weber County. Except that Portion deeded to Gary Christensen in Book 1430, page 2253. Except that portion deeded to Tracy Smith and Tamra A. Smith in Book 1495, page 2528.

18. Lee Howard or Norma Birda Howard, Trustees of the Howard Family Trust, dated November 19, 1992, own property identified as the Howard Property on the drawing found in paragraph 3 of the Findings of Fact, located in the north half of the southeast quarter of Section 13, Township 6 North, Range 3 West, SLBM, , and the north half of the southwest quarter of Section 18, Township 6 North Range 2 West, SLBM and specifically identified as follows:

> The north ½ of the southeast quarter of section 13, Township 6 North, Range 3 West, Salt Lake Meridian, U.S. Survey: Except that portion conveyed to George A. Muirbrook and Wife Shirley A. Muirbrook in Book 916, Page 77.

Also part of the southwest quarter of section 18, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey: Beginning east 138.2 feet to the west line of the county road and north along said road 500 feet from the southwest corner of the north ½ of said quarter section; thence northerly along the west line of said county road to west line of said quarter section; thence south along said line to the north property line of the George A. Muirbrook property conveyed in Book 916, Page 77; Thence northeast along said line to beginning.

19. Neither of the defendants owns a water right. Defendant Lee Howard owns shares in the Knight Irrigation Company and irrigates using that water from a diversion point south of the separation tin as identified on the drawing reproduced in paragraph 3.

20. The slough has a generally south to north flow, but that flow can change depending on conditions, including the pumping cycle.

21. The relevant portion of the slough begins at the north end of property owned by plaintiff Wayment, continues southward through the England property, then through the Lee Howard property, and terminates at a point identified by the parties as the "separation tin" on property owned by Knight Irrigation Company.

22. Plaintiffs and all irrigators in Weber County are entitled to four acre-feet of water per acre of land irrigated. Although the Certificate provides for a duty of 3 acre feet per acre irrigated, that duty was increased for Weber County.

23. In the spring of 1998, without a permit from the State Engineer, defendants built a dike in the portion of the slough that runs through the Lee Howard property. The dike was enlarged in February of 2000.

24. Lee Howard contacted the United States Army Corps. of Engineers in connection with his construction of the dike. The Corps of engineers granted a nationwide permit to construct the dike and instructed him to install two pipes on the hard pan, down on the ground in the mud.

25. Defendants installed at least two pipes in the dike, a 36 inch pipe, which sits roughly in the middle of the dike, and a 15 inch pipe, which sits several feet north of the larger pipe.

26. The dike is upstream from one of the primary tributaries to the slough, known as the West Warren Drain. This drain delivers irrigation runoff water from property to the west.

27 Installed to permit access across the slough to a portion of Lee Howard's property, the dike includes two visible pipes, one 36" in diameter, and another 15" in diameter.

28. Neither plaintiffs nor defendants have taken any flow measurements in the slough. Plaintiffs have diverted more than 75 acre-feet of water from the Marriot Slough during the period May 1 to September 30. Plaintiffs irrigate more acreage than the 25 specified in the Certificate.

29. The dike interferes with plaintiffs' water right by affecting the slough and how it naturally operated. The dike has decreased or slowed the flow of water to plaintiffs' pump and otherwise changed the way the slough functions by changing its flow. The dike also threatens to interfere with plaintiffs' water right in the future.

30. The dike forced plaintiffs to hold the water level in the slough higher to allow the water to reach the pipes in the dike. This made it harder for plaintiffs to irrigate by slowing the irrigation process.

31. Holding the water higher also caused water to pool or meander into areas on the Lee Howard property where defendants claimed it had not historically gone.

32. Defendant William Howard once removed the tin in the 5900 West ditch, causing the slough to partially drain.

33. In 2000, Weber County began dredging the slough. Defendant Lee Howard requested that the county stop that dredging work at his property line. Plaintiffs then paid to have the slough on their property dredged so that the water would flow more freely. Plaintiffs failed to obtain a dredging permit, and dredging was stopped while the Army Corps of Engineers investigated the matter. Later, the Army Corps permitted plaintiffs to dredge. Defendants did not allow any dredging on their property.

34. Because the dike forced plaintiffs to hold water in the slough higher, and because defendant Lee Howard did not dredge his property, plaintiffs did not commit trespass or nuisance by dredging or causing water to flow onto defendant Lee Howard's property. Any damage is the result of the effect of defendants' dike on how the slough naturally operated and defendant Lee Howard's decision not to dredge.

35. Neither have plaintiffs created a nuisance, trespassed or been negligent by their use of their water right, including operation or use of the drain tin in the ditch along 5900 West. Plaintiffs' water right and their method of appropriating water are protected. As a result, use of the tin to dam the slough is legal. Temporary damming has always been part of plaintiffs' approved methodology in irrigating their property.

36. Plaintiff Wayment owns 143 shares of Warren Irrigation Company. Plaintiff England owns ten shares and leases another four shares. To compensate for the change in the

flow caused by the dike and to irrigate additional acreage, plaintiffs used their Warren Irrigation water to supplement their irrigation needs.

37. Plaintiff England also purchased 200 acre feet of additional water from Weber Basin Water Conservancy District for additional irrigation.

38. England's Weber Basin water is diverted from the Weber River pursuant to an approved Exchange Application, no. E4199 (35-11189). England has not obtained approval from the State Engineer to divert that water from the slough. Defendants protested that exchange application.

39. Defendants protested plaintiff England's effort to purchase additional water from Weber Basin.

40. In 1996, plaintiffs filed Application to Appropriate Number A71312 (35-10520) in an effort to appropriate and use additional water from the slough. Defendants, among others, protested that application. That application was denied in 1999 by the State Engineer based on his conclusion that there was insufficient unappropriated water in the slough.

41. Plaintiffs may have, at times, abused or overused their water right by irrigating more than the 25 acres they are entitled to under their water right.

42. Plaintiffs did not obtain formal State Engineer approval for using their Warren Irrigation shares on their land. It is common, however, for different parcels to be irrigated within an approved place of use. Warren Irrigation Company's water right includes approved use within section 13, where plaintiffs' land is located, although the precise parcels irrigated by plaintiffs with their Warren shares are not part of the original Warren water right as approved.

43. Defendants do not have any authority or right to restrict, regulate or limit plaintiffs' water use or to regulate the flow or level of the slough.

44. To remedy the interference with plaintiffs' water right, defendants may deepen the slough channel, lower the drain pipe(s) or add additional pipes. They could also dredge the slough on their property consistent with the dredging on plaintiffs' property.

45. Benchland Investments, Ltd. was substituted as a plaintiff for Glynn F. Wayment.

CONCLUSIONS OF LAW

1. Water in Utah is the property of the public, subject to all existing rights to the use thereof. No one may diminish, obstruct or interfere with the approved water rights of another.

2. An appropriator of water from a stream or body of water also acquires the right to continue to use his method or means of diverting by which the water right is beneficially used.

3. A property owner may not impound, obstruct or impede in any manner the free and natural flow of water to which a senior appropriators is entitled at his point of diversion.

4. Defendants are not permitted to regulate plaintiffs' water right specifically or the flow or level of the slough generally. That type of regulation is the responsibility of the Utah State Engineer and/or others. The fact that plaintiffs pump more than .5 cfs during the pumping cycle does not invalidate the water right as long as the water is being put to beneficial use.

5. Defendants' dike constitutes interference with plaintiffs' water right. Defendants are ordered to modify the dike, by using one of the above-described methods, to return the

slough, as close as possible, to its prior natural state and operating condition. The modification of the dike is to commence as soon as practicable.

6. Should defendants have proposals for other methods of returning the slough to its historic flow, they must submit those proposals to the court within fifteen days after entry of the Judgment.

7. Defendants are permanently enjoined from any further interference with plaintiffs' water rights. They are permanently enjoined from impounding, obstructing, or impeding in any manner the free and natural flow of the slough.

8. Plaintiffs' withdrew their trespass claim at trial. That claim is therefore dismissed, with prejudice.

9. Defendants' counterclaims for trespass, nuisance and negligence are hereby dismissed, with prejudice.

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10. As the prevailing parties, plaintiffs are awarded their costs pursuant to rule 54(d) of the Utah Rules of Civil Procedure.

11. The parties are responsible for their own attorney fees.

MAY 12, 2005.

BY THE COURT

W. Brent West
District Court Judge

Approved as to form:

J. Craig Smith
Attorney for defendants

CERTIFICATE OF SERVICE

I certify that on January ____ 2005, a copy of the foregoing Findings of Fact and Conclusions of Law was delivered to the following by:

[ ] Hand Delivery

[ ] Facsimile

[X] U.S. Mail, postage prepaid

[ ] Federal Express

[ ] Certified Mail, Receipt No. ____, return receipt requested

J. Craig Smith
Smith Hartvigsen
215 South State, #650
Salt Lake City UT 84111

2005 MAY 12 A 11:03

MAY 12 2005 SECOND DISTRICT COURT

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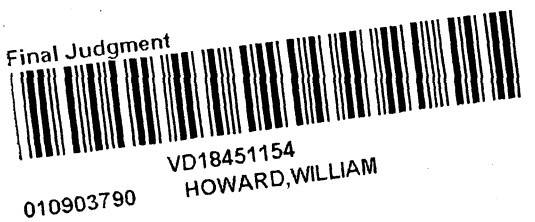
Attorneys for Plaintiffs

STATE OF UTAH
IN THE SECOND DISTRICT COURT FOR WEBER COUNTY

GLYNN F. WAYMENT and EDWARD C. ENGLAND, Plaintiffs, vs. WILLIAM HOWARD and LEE R. HOWARD Defendants.	**FINAL JUDGMENT** Civil No. 010903790 Judge: W. Brent West



This matter was tried to the bench on November 13, 14 and 17, 2003. Plaintiffs were present and represented by John H. Mabey, Jr. and David C. Wright. Defendants were present and represented by J. Craig Smith and Scott Crook.

Having considered the testimonial, documentary and other evidence and the argument of counsel, and having viewed the subject properties and area in question on November 14, and incorporating by reference the court's Decisions of April 26, 2004 and August 23, 2004, and consistent with the Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that

1. Defendants are to modify the dike that is the subject of this action by using one of the methods described in the court's Findings and Conclusions, to return the slough, as close as possible, to its prior natural state and operating condition. That modification is to commence as soon as practicable.

2. Should defendants have proposals for other methods of returning the slough to its historic flow, they must submit those proposals to the court within fifteen days after entry of this Judgment.

3. Defendants are permanently enjoined from any further interference with plaintiffs' water right. They are permanently enjoined from impounding, obstructing or impeding in any manner the free and natural flow of the slough.

4. Plaintiffs' trespass claim is dismissed, with prejudice.

5. Defendants' counterclaims for trespass, nuisance and negligence are hereby dismissed, with prejudice.

6. As the prevailing parties, plaintiffs are awarded their costs pursuant to rule 54(d) of the Utah Rules of Civil Procedure to be established by a Memorandum of Costs.

7. The parties are responsible for their own attorney fees.

MAY 12, 2005.

BY THE COURT

W. Brent West
District Court Judge

Approved as to form:

J. Craig Smith
Attorney for defendants

CERTIFICATE OF SERVICE

I certify that on January ____ 2005, a copy of the foregoing Judgment was delivered to the following by:

[ ] Hand Delivery

[ ] Facsimile

[X] U.S. Mail, postage prepaid

[ ] Federal Express

[ ] Certified Mail, Receipt No. ____, return receipt requested

J. Craig Smith
Smith Hartvigsen
215 South State, #650
Salt Lake City UT 84111

_____

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

GLYNN F. WAYMENT and
EDWARD C. ENGLAND,
Plaintiffs,

vs

WILLIAM HOWARD and
LEE R. HOWARD,
Defendants.

DECISION

Case No.: 010903790
Judge: W. Brent West
Clerk: Pamela Allen

This case has taken on an interesting life of its own. In light of the Court's following Ruling, it will not be necessary for the Court to have a hearing as requested. Also, the Court apologizes for not being more clear in its original Ruling. The issues contained in the Defendants' Counterclaim were addressed inferentially, but not directly. The Court will now try to clear up any confusion or ambiguity.

First, the Defendants' trespass claim was formally withdrawn at trial.

The Defendants' second claim is dismissed with no cause for action. In its earlier decision, this Court found specifically that the Plaintiffs' water rights and *their method of appropriating water are protected.* As a result, use of the tin plates to dam the slough is legal. The evidence, at trial, was that damming the canals are the way that the Plaintiffs have always increased the water in the slough to a level where they could flood irrigate their property.

Temporary damming has always been part of the Plaintiffs approved methodology in irrigating their property.

The Defendants' third claim is also dismissed with no cause of action, but for a different reason. The Court's original ruling does not prohibit the Defendants from having access to all portions of their property. The Court did not order removal of the dike. Rather, the Court ordered that the dike be reconstructed in such a way that the slough operated the same way it did before the dike was constructed. Such a reconstruction would still permit or allow the Defendants access to all portions of their land. In addition, the Defendants constructed the dike. It could have been constructed in a way that did not cause them damage.

The final issue to be addressed is the Plaintiffs' request that the Court amend its prior Ruling to include a decision concerning a second alleged interference with Plaintiffs' water rights. The Plaintiffs now allege that the Defendants have deposited mounds of dirt or soil that have narrowed the slough and again interferes with the Plaintiff's water rights. Although judicial economy makes it tempting for the Court to reach out and decide this matter, the Court is of the opinion that legally, it cannot reach this issue, under the present circumstances. This second situation has arisen since the Court decided the first issue of alleged interference with Plaintiffs' water rights, but before a final Judgment was entered. Also, the Court does not have a sufficient factual understanding, nor enough evidence presented, that would allow the Court to make a decision that the Plaintiffs' water rights are again being interfered with by the Defendants deposit of soil.

Hopefully, this decision supplements the first decision sufficiently for the Plaintiffs to prepare Findings of Fact, Conclusions of Law and a Judgment, consistent with the Court's Rulings. The issue of the Defendants' alleged second interference with the Plaintiffs' water rights remains alive and well for litigation at another time.

Dated this 23rd day of August 2004.

Judge W. Brent West
Second District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Decision to the parties as follows:

John H. Mabey, Jr.
David C. Wright
265 East 100 South #300
Salt Lake City, Ut 84111

J. Craig Smith
Smith Hartvigsen
215 South State #650
Salt Lake City, Ut 84111

Dated this 25th day of August, 2004.

Deputy Clerk

2005 UT 58

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

Lawrence W. Searle and
Ann C. Searle,
Plaintiffs and Appellants,

v.

Milburn Irrigation Company,
William M. Hamilton, and
The Utah State Engineer, Jerry
D. Olds, P.E.,
Defendants and Appellees.

No. 20040406

F I L E D

September 2, 2005

Sixth District, Manti Dep't
The Honorable David L. Mower
No. 202600165

Attorneys: Bryan J. Pattison, St. George, for plaintiffs
Mark L. Shurtleff, Att'y Gen., Heather B. Shilton,
Norman K. Johnson, Asst. Att'ys Gen., Salt Lake City,
for defendant Utah State Engineer Jerry D. Olds, P.E.
John H. Mabey, Jr., David C. Wright, Salt Lake City,
for defendant Milburn Irrigation Company

DURRANT, Justice:

¶1 In this case, we are called upon to address several questions concerning the procedure applicable to the approval or rejection of applications proposing a change in water use. More specifically, we must determine whether the district court properly invoked the preponderance of the evidence standard of proof and correctly allocated the burden of proof when rejecting a change application. Additionally, we must decide whether a change applicant's prima facie showing that no impairment of vested water rights will result from application approval can be successfully undermined by circumstantial evidence demonstrating the probability of impairment.

¶2 When considering the change application at issue in this case, the district court utilized a burden-shifting approach whereby the change applicant was first required to show "reason to believe" that approval of the application would not result in impairment of vested water rights. After that initial showing, the district court shifted the burden to the protesting party to show, by a preponderance of the evidence, that approval of the application would result in impairment of vested rights. We conclude that the approach adopted by the district court is inharmonious with our case law and that a remand is therefore necessary. We hold that an applicant seeking a change in water use need only show reason to believe that approval of the application will not result in impairment of vested water rights and that the applicant bears the burden of persuasion throughout the application process. A protestant may, however, successfully oppose application approval by producing either direct or circumstantial evidence that sufficiently undermines the applicant's showing that the use proposed can be accomplished without impairing vested rights. After explaining the factual background of the present case, we will analyze each of the issues identified above.

BACKGROUND

¶3 Appellants Lawrence and Ann Searle own property on the Wasatch Plateau, which plateau forms the east boundary of the Sanpete Valley in Sanpete County, Utah. The Searles purchased the property in 1999, intending to construct a cabin on the site. However, in order for the Searles to obtain a building permit, they were required to establish the presence of an on-site source of water sufficient to meet the needs of the cabin.

¶4 In an effort to satisfy this requirement, the Searles purchased water right number 65-2977, which carries a priority date of 1956. As owners of that water right, every year the Searles are entitled to one half-acre foot of water, to be used for irrigation purposes, from April 1 to October 31. The point of diversion for the Searles' water right is a well located near the town of Chester, Utah, in the Sanpete Valley. The Chester well is a significant distance from the Searles' cabin property, and thus the Searles' water right does not currently satisfy the requirement of on-site water. Therefore, after acquiring the water right, the Searles sought to change the point of diversion, place of use, and nature of use of the water right. Specifically, the Searles desired to change the point of diversion to an existing well, known as the Jacobsen well, located near their cabin property, and to use the water for stockwatering and domestic purposes year round, rather than for

seasonal irrigation. Taking the first step in the process to perfect such a change in use, the Searles properly completed and filed a change application with the State Engineer. The change application was advertised as required by the Utah Code, Utah Code Ann. § 73-3-6 (Supp. 2004), and Appellee Milburn Irrigation Company ("Milburn") timely protested the Searles' application.

¶5 Milburn is a Utah corporation consisting of approximately twenty-six shareholders and is operated with the purpose of distributing water to its shareholders via gravity-pressurized sprinkler irrigation systems. Milburn owns water right number 65-2256, which carries a priority date of 1876. Milburn's water right entitles the company to divert 8.875 cubic feet of water per second from the South San Pitch River, also known as the South Fork of the San Pitch River, annually during the period of April 1 to October 15, to irrigate 639.9 acres. Typically, Milburn is not able to satisfy the entire amount of its water right during that period, as water flow slows as the summer wears on. By August, Milburn is usually only able to divert just one cubic foot per second.

¶6 Milburn's protest against the Searles' change application was motivated by Milburn's concern that the Jacobsen well, which is located in the drainage area that contributes to Milburn's sources of water, is connected in some degree with Milburn's water source and that the Searles' use of that well could further exacerbate water shortfalls that Milburn has been experiencing for many years.

¶7 The State Engineer convened a hearing to address the concerns raised by Milburn's protest. After hearing testimony and argument concerning the possibility of a connection between the Jacobsen well and Milburn's water source, the State Engineer rejected the Searles' change application, concluding that "the area proposed for diversion could serve as a contributing source for [Milburn's] water supply." After the Searles' request for reconsideration was denied, the Searles filed the current action, seeking judicial review of the State Engineer's decision.[1]

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[1] Change application proceedings are designated as informal adjudicative proceedings, see Utah Admin. Code R655-6-2 (2005), for which judicial review under the Administrative Procedures Act is available. See Utah Code Ann. § 73-3-14 (1989); see also id. § 63-46b-15(1)(a) (2004) ("[D]istrict courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings . . . ."); Utah Admin. Code R655-6-18 (providing for judicial review in accordance with

(continued...)

¶8 The district court, hearing evidence de novo, was supplied with testimony from three expert witnesses on the issue of impairment. The Searles' expert, Gerald B. Robinson, Jr., testified that the deep water aquifer supplying the Jacobsen well is not connected to Milburn's water source. According to Robinson, if Milburn's water source was connected to the Jacobsen well, Milburn would not experience water shortfall in the summer months because the deep aquifer would keep the river saturated at all times. Robinson also testified that Milburn's water source does not exhibit the artesian pressure found in the Jacobsen well and that is generally observed in the Sanpete Valley, an indication that the water sources are independent of one another.

¶9 Two expert witnesses countered Robinson's conclusion. Both experts were of the opinion that the two water sources are connected in some fashion. Kirk Forbush testified that, while Robinson may be correct that water from the Jacobsen well generally travels in such a fashion as to bypass Milburn's water source, some of that water is contributing to the base flow of the South San Pitch River. Forbush reasoned that since the South San Pitch River has a base flow regardless of whether there is snow melt, the river must have an additional source of water. He further testified that the Jacobsen well is located in a formation that supplies water from consolidated rock into springs and streams, which, in turn, augment the flow of the San Pitch River. Accordingly, Forbush concluded that if the Searles use water from the Jacobsen well, Milburn's water supply will suffer. Charles Williamson, a stream alteration specialist, essentially concurred in the reasoning of Forbush, but also suggested that the lack of artesian pressure at Milburn's water source and the presence of such pressure at the Jacobsen well could possibly be explained by elevation differences.

¶10 After hearing the evidence relevant to the impairment issue, the district court reached the same conclusion as the State Engineer, stating in a ruling from the bench that "I'm . . . convinced that there's--by a preponderance of the evidence, that the rights of [Milburn] will be impaired if the application is approved." The Searles now appeal from the district court's order denying their change application. On appeal, the Searles contend that the district court imposed an impermissibly light burden on Milburn.

---

[1] (...continued)
sections 63-46b-14 and -15 of the Utah Code).

¶11 Specifically, the Searles maintain that once they established a prima facie case that approval of their change application would not result in the impairment of vested rights, the burden shifted to Milburn to show that the approval of the application would actually result in such impairment, not merely that impairment would likely occur. Therefore, the Searles claim that the district court incorrectly required Milburn to meet its burden by a preponderance of the evidence. According to the Searles, Milburn's burden should have been much higher. Although the Searles shy away from labeling the standard they feel should be properly imposed in circumstances such as this, they are, in essence, requesting a rule that requires parties protesting change applications to provide clear and convincing evidence demonstrating impairment before a change application can be rejected.

¶12 Taking a different approach, the State Engineer urges us to affirm the result reached by the district court, but to repudiate the burden-shifting scheme it utilized. According to the State Engineer, the burden of persuasion remains on change applicants throughout the application process to establish by a preponderance of the evidence that application approval will not result in impairment. Milburn argues, however, that we should affirm the district court and expressly adopt the burden-shifting approach it used. After articulating the appropriate standard of review, we will address the parties' arguments. We have jurisdiction pursuant to Utah Code section 78-2-2(f) (2002).

STANDARD OF REVIEW

¶13 To resolve the issues before us, we must determine whether the district court (1) properly invoked the preponderance of the evidence standard of proof, (2) appropriately allocated the burden of proof, and (3) correctly concluded that a change applicant's prima facie showing that no impairment will result from application approval can be undermined by circumstantial evidence demonstrating the probability of impairment.

¶14 As to the first issue, we review a district court's determination of the proper standard of proof for correctness, as discerning the appropriate standard to apply in any given case involves statutory interpretation or interpretation of case law. See generally State v. Pena, 869 P.2d 932, 935 (Utah 1994) ("Legal determinations . . . are defined as those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances."); see also Hansen v. Hansen, 958 P.2d 931, 933 (Utah Ct. App. 1998) (reviewing a trial court's invocation of a

clear and convincing standard of proof for correctness); In re R.N.J., 908 P.2d 345, 349 (Utah Ct. App. 1995) (stating that whether a trial court applied the appropriate standard of proof is a question reviewed for correctness) superceded by statute on other grounds as stated in In re E.H.H., 2000 UT App 368, ¶ 16, 16 P.3d 1257. The identical standard of review applies to the second issue on appeal, as it is well established that we review a court's allocation of the burden of proof for correctness. Beaver County v. Utah State Tax Comm'n, 916 P.2d 344, 357 (Utah 1996).

¶15 Finally, turning to the third issue on appeal, we note that we have never had occasion to articulate the standard of review applicable to a district court's rejection of a change application when the ground for that rejection is the probability that vested water rights will be impaired by the use proposed in the application. This issue is best viewed as a mixed question of fact and law, as the district court must first find facts relevant to the issue of impairment and then determine whether those facts are within the ambit of "impairment," such that the change application should be rejected. See Jensen v. IHC Hosps., Inc., 2003 UT 51, ¶ 57 n.11, 82 P.3d 1076 ("A mixed question involves . . . the determination of whether a given set of facts comes within the reach of a given rule of law." (internal quotation omitted)); cf. Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co., 2004 UT 67, ¶ 43, 98 P.3d 1 (reviewing a district court's determination that water was put to beneficial use as a mixed question of fact and law).

¶16 When reviewing a district court's conclusion regarding a mixed question of fact and law, we typically grant some level of deference to the district court's application of the law to the facts. See Pena, 869 P.2d at 937-39 (discussing role of appellate courts in setting limits on the amount of discretion district courts enjoy when applying law to facts). "The measure of discretion afforded varies, however, according to the issue being reviewed." State v. Hansen, 2002 UT 125, ¶ 26, 63 P.3d 650. We consider multiple factors when determining how much deference to grant a district court's application of law to facts. Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998). Specifically, we analyze whether (1) the facts at issue are so *complex, and arise in such variation, that it would be* impractical to supply a rule that adequately accounts for the implications of all the facts; (2) the context in which the application of law to facts occurs is somehow novel or new, such that appellate courts are unable to discern and clearly state what factors are outcome determinative; and (3) the district court has observed facts that are not adequately preserved by a

record of the proceedings before it, e.g., witness demeanor. Pena, 869 P.2d at 938-39.

¶17 In the present case, consideration of the three Pena factors leads us to conclude that at least some deference should be granted to the district court's application of the law to the facts. First, there are myriad factual scenarios, interplaying with complex scientific principles, that can arise when determining whether approval of a change application will result in impairment of vested rights, making it exceedingly difficult to craft a uniform rule neatly applicable in all situations. See generally Crafts v. Hansen, 667 P.2d 1068, 1071-80 (Utah 1983) (discussing in detail the affidavits of experts who addressed various factual scenarios when opining as to the possibility of impairment in five separate cases involving change applications). Second, although reported cases discussing the possibility of impairment stretch far back in this state's history, our case law has not yet meaningfully constrained a district court's discretion to conclude that evidence of impairment is sufficient to prevent approval of a change application. Third, and finally, the district court enjoys an appreciable advantage over appellate courts in this context due to its ability to assess witness demeanor and credibility, factors that are not readily discernable from a cold record. See Pinecrest Pipeline Operating Co., 2004 UT 67 at ¶ 48.

¶18 However, given the importance of water in this state, there is a strong public policy interest in promoting consistent and predictable results in disputes over the permissible use of that water. Therefore, it is appropriate that district court discretion be somewhat constrained in this area. See Jeffs, 970 P.2d at 1244 (stating that appellate courts, when setting discretionary limits, should consider the policy interest in creating "standard uniformity among trial courts addressing the question"). Consequently, we conclude that district courts enjoy significant, but not broad, discretion when determining whether evidence of impairment is sufficiently compelling to foreclose application approval. Cf. Pinecrest Pipeline Operating Co., 2004 UT 67 at ¶ 50 (granting "significant, though not broad, discretion" to a district court determination that water had been put to beneficial use). Having outlined the appropriate standards of review, we now turn to the issues raised in this appeal.

ANALYSIS

¶19 To resolve the issues before us, we must determine whether the district court (1) properly invoked the preponderance

of the evidence standard of proof, (2) appropriately allocated the burden of proof, and (3) correctly concluded that a change applicant's prima facie showing that no impairment will result from application approval can be undermined by circumstantial evidence demonstrating the probability of impairment.

¶20 On appeal, Milburn contends that the district court's approach was correct, while both the State Engineer and the Searles contend that the district court's approach was flawed. Although the State Engineer and the Searles agree that the district court's approach was flawed, they disagree as to the appropriate outcome of this appeal. Specifically, the State Engineer requests that we not disturb the result reached by the district court, but that we merely correct the mechanism by which that result was reached. In contrast, the Searles request a reversal.

¶21 To untangle the threads of the parties' arguments, we first provide a brief overview of the change application process as well as the approach taken by the district court in the present case. We then identify and discuss the appropriate standard of proof and the proper allocation of the burden of proof in the change application context. Finally, we address the Searles' contention that circumstantial evidence demonstrating a probability of impairment can never be sufficient to defeat a change applicant's prima facie showing that no impairment will result from application approval.

I. THE CHANGE APPLICATION PROCESS AND THE PROCEEDINGS BELOW

¶22 Before turning to the parties' arguments relative to the appropriate standard of proof and the proper allocation of burdens, we first provide, for purposes of context, a brief overview of the change application process itself, as well as the procedural course followed by the district court in the present case.

A. The Change Application Process

¶23 Utah law provides that a water right holder is entitled to change the point of diversion or the place or nature of use of water so long as vested rights are not impaired by the change. See Utah Code Ann. § 73-3-3(2) (Supp. 2004). The legislature has designated the state engineer as the appropriate officer to initially determine whether an application seeking permission to initiate such a change should be approved. See id. §§ 73-3-3(4), 73-3-8 (1989 & Supp. 2004). In making that determination, the state engineer is statutorily obligated to "follow the same

procedures, and the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place of use, or purpose of use shall be the same, as provided in this title for applications to appropriate water." Id. § 73-3-3(5)(a) (Supp. 2004). Those elements are codified in section 73-3-8 of the Utah Code, which requires, in relevant part, that the State Engineer approve an application if the following conditions are met:

> (a) there is unappropriated water in the proposed source;[2] (b) the proposed use will not impair existing rights or interfere with the more beneficial use of the water; (c) the proposed plan is physically and economically feasible . . . and would not prove detrimental to the public welfare; (d) the applicant has the financial ability to complete the proposed works; and (e) the application was filed in good faith and not for purposes of speculation or monopoly.

Id. § 73-3-8(1) (1989). After an application is approved, the applicant is then empowered to take steps to perfect the right to use the water in the manner contemplated by the change application. See id. §§ 73-3-10, and -16 (Supp. 2004); Crafts v. Hansen, 667 P.2d 1068, 1082 (Utah 1983) (Oaks, J., dissenting).

¶24 In the present case, both the State Engineer and the district court concluded that the Searles satisfied all of the obligations outlined in section 73-3-8(1) except the requirement that the proposed use not impair existing rights. On appeal, the Searles and the State Engineer take exception to the approach adopted by the district court in reaching its conclusion. The State Engineer maintains that the district court improperly shifted the burden of persuasion to Milburn after the Searles made a prima facie case demonstrating that no rights would be impaired by the approval of their application. Meanwhile, the Searles maintain that the district court correctly shifted the burden of persuasion, but improperly imposed only the preponderance of the evidence standard of proof on the issue of impairment. After outlining the approach taken by the district court, we will address in turn the parties' allegations of errors in that approach.

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[2] This factor is inapplicable in this case, as the Searles do not seek to appropriate water, but to change the point of diversion and nature of use of previously appropriated water.

B. The Approach Adopted by the District Court

¶25 As mentioned above, the crux of the parties' disagreement over the appropriateness of the district court *proceeding centers on the propriety of the standard of proof* invoked by the district court, as well as the manner in which the court allocated the burden of proof. Our pronouncements on the proper standard of proof and the appropriate allocation of the burden of proof in the change application context have not resulted in a clear approach and, in fact, seem to have engendered considerable confusion--evidenced by the fact that all three parties to this appeal read our case law on this issue in a different manner.

¶26 The district court relied upon our decision in Crafts in concluding that change applicants bear an initial burden to show reason to believe that no impairment will result from the proposed change in use and that a party protesting an application must rebut that prima facie showing by a preponderance of the evidence. In Crafts, when discussing the standard of proof and the appropriate allocation of burden in the change application context, we quoted with approval our previous statement on those issues found in Salt Lake City v. Boundary Springs Water Users Ass'n, in which we stated as follows:

> If the evidence shows that there is reason to believe that the proposed change can be made without impairing vested rights the application should be approved. . . . A change application cannot be rejected without a showing that vested rights will thereby be substantially impaired. While the applicant has the general burden of showing that no impairment of vested rights will result from the change, the person opposing such application must fail if the evidence does not disclose that his rights will be impaired.

270 P.2d 453, 455 (Utah 1954) (footnotes omitted). Our statement in Boundary Springs remains our most definitive pronouncement on the standard of proof and allocation of burden in the change application context.

¶27 Although Crafts does contain language touching on those issues, that case directly considered only whether a district court's entry of summary judgment approving five change applications was appropriate. 667 P.2d at 1069. We held that

summary judgment was inappropriate under the circumstances and remanded the case to the district court. See id. At the conclusion of the Crafts opinion, we provided guidance to the district court as to the appropriate course to follow after remand, stating that

> [t]he determinative question before the trial court will be whether there is reason to believe, on the basis of current information, that existing water rights will not be impaired by the changes proposed in the applications. Once the respondents make a prima facie showing at trial that there is reason to believe, on the basis of available data, that the changes can be lawfully approved, the appellants will have the burden of proving by a preponderance of the evidence either that the available data is insufficient to give rise to 'reason to believe' or that available data in fact creates a reason to believe that the changes cannot be lawfully approved.

Id. at 1081. While we did provide an articulation of the procedure to follow on remand in Crafts, we specifically acknowledged the limit of our holding in that case: "The respondents' arguments respecting the standards for approval of change applications, the burden of proof on the 'reason to believe' issue, and the authority of the State Engineer to make his approval conditional and interlocutory are all accurate. They are, however, irrelevant to the basis upon which we reverse . . . ." Id. at 1080.

¶28 Regardless of their precedential status, our pronouncements in Boundary Springs and Crafts serve as the most detailed guidance we have supplied litigants regarding the appropriate standard of proof and proper allocation of burden in the change application context, and the district court was correct in turning to those cases in its attempt to discern the appropriate process. Unfortunately, our previous statements concerning the proper procedure to follow when considering the merits of a change application have been undeniably opaque, and reading our pronouncements on the issue in isolation can result in the imposition of an inappropriate standard of proof and an improper allocation of the burden of proof. However, when Crafts and Boundary Springs are read in concert with the Utah Code and our prior case law, the muddied water begins to clear and the appropriate approach becomes apparent.

¶29 The parties to the present appeal disagree on three fundamental points relating to the appropriateness of the course followed by the district court: (1) whether the proper standard of proof governing a determination that impairment will result from application approval is "preponderance of the evidence" or some other standard more favorable to a change applicant, (2) whether the burden of persuasion shifts to a protestant after an applicant makes a prima facie showing that application approval will not result in impairment of vested rights, and (3) whether an applicant's prima facie showing of no impairment can be sufficiently undermined by circumstantial evidence so as to make application approval inappropriate. We address each disagreement in turn and conclude that change applicants are required to show only reason to believe that impairment will not result from application approval, that the burden of persuasion remains on change applicants throughout the application process, and that circumstantial evidence may be sufficiently compelling to make application approval inappropriate.

II. THE STANDARD OF PROOF

¶30 Both the State Engineer and Milburn argue that if a preponderance of the evidence establishes that vested rights will be impaired by the approval of a change application, the application must be rejected. On the other hand, the Searles contend that a change application can only be denied if direct, non-circumstantial evidence clearly demonstrates that impairment will actually result from the application's approval. Our case law establishes, however, that the proper standard, "reason to believe," lies somewhere between the two measures advanced by the parties. After first explaining our conclusion that a preponderance of the evidence standard is not appropriate in the change application context, we then discuss and give content to the appropriate, "reason to believe," standard.

A. A Change Applicant Need Only Show Reason to Believe that No Impairment Will Result from Application Approval

¶31 The Utah Code states that a change in water use "may not be made if it impairs any vested right without just compensation." Utah Code Ann. § 73-3-3(2)(b) (Supp. 2004). However, at the application phase, our case law makes it clear that a change applicant is only required to show "reason to believe" that no impairment will result from application approval. See, e.g., Crafts v. Hansen, 667 P.2d 1068, 1082 (Utah 1983) (Oaks, J., dissenting) (stating that "reason to believe" "is the practical equivalent of a probable cause determination in

a criminal case"); Piute Reservoir & Irr. Co. v. W. Panguitch Irr. & Reservoir Co., 367 P.2d 855, 858 (Utah 1962) ("[T]he correct rule . . . is that the applicant must shown [sic] reason to believe that the proposed application for change can be made without impairing vested rights."); Am. Fork Irr. Co. v. Linke, 239 P.2d 188, 191 (Utah 1951) ("We recognize plaintiffs' duty to prove that vested rights will not be impaired by approval of their application, but we also recognize that such duty must not be made unreasonably onerous . . . ."); United States v. Dist. Court, 238 P.2d 1132, 1135 (Utah 1951) ("[The court] must determine from the evidence whether there is probable cause to believe . . . that such water can be diverted from the source of supply and used without injury to or conflict with prior rights."); Eardley v. Terry, 77 P.2d 362, 366 (Utah 1938) ("[W]hen the application is filed, the state engineer is called upon to determine preliminarily whether there is probable cause to believe that an application can be perfected, having due regard to whether . . . it can be diverted and so used without injuring or conflicting with the prior rights of others."). Even our decision in Crafts, which the district court relied upon when determining the appropriate standard of proof, stated quite clearly that "[t]he determinative question before the trial court will be whether there is reason to believe, on the basis of current information, that existing water rights will not be impaired by the changes proposed in the applications." 667 P.2d at 1081 (emphasis added).

¶32 In the present case, the State Engineer and Milburn argue that the reason to believe standard only applies at the preliminary stage of the application process and that application approval or denial ultimately rests on the preponderance of the evidence. However, that approach improperly combines the standard of proof applicable to the application process with the standard of proof applicable to a final adjudication of rights.

¶33 In other words, the parties' confusion as to the appropriate burden to apply in the change application context stems from an imperfect understanding of the two roles played by the court system when water rights are at issue. In some situations courts are called upon to adjudicate rights, in other situations courts are called upon merely to review an administrative decision relating to those rights. The present case falls into the latter category.

¶34 As a preliminary matter, it is well established that the state engineer has no authority to finally adjudicate water rights. As we stated in District Court, 238 P.2d at 1137, "[t]he Engineer in granting an application does not determine that the

applicant's rights are prior to the rights of the protestant but only finds that there is reason to believe that the application may be granted and some water beneficially used thereunder without interfering with the rights of others." See also Linke, 239 P.2d at 190 ("[T]he Engineer's findings and decision have a sanctity extending no further than the authority delegated by law to his office."); Whitmore v. Murray City, 154 P.2d 748, 750 (Utah 1944) ("The office of state engineer was not created to adjudicate vested rights between parties, but to administer and supervise the appropriation of the waters of the state."). In District Court, we stated that the state engineer's decision to approve or reject an application "is administrative in nature and purpose and the decision of the court on review, except for the formalities of the trial and judgment is of the same nature and for the same purpose." 238 P.2d at 1137. See also Crafts, 667 P.2d at 1070 (stating that when a district court reviews the state engineer's approval or denial of an application, "[t]he issues . . . [are] strictly limited to those which were, or could have been, raised before the State Engineer"); Dist. Court, 238 P.2d at 1135 ("[The district court] should simply determine whether the application was rightly rejected. In determining that question, the court stands in the same position as the state engineer did. It must determine from the evidence whether there is probable cause to believe that . . . [water can be] used without injury to or conflict with prior rights.").

¶35 Accordingly, the conclusion is inescapable that a district court, when reviewing the state engineer's decision to approve or reject an application, is not sitting in its capacity as an adjudicator of rights, but is merely charged with ensuring that the state engineer correctly performed an administrative task. We stated as much in Eardley, when we acknowledged that, when conducting a de novo review of the state engineer's approval or rejection of an application, the court simply "determines whether the application should be approved or rejected and does not fix the rights of the parties beyond the determination of that matter." 77 P.2d at 365. As will be discussed in more detail below, it follows that a change applicant should be subjected to a less onerous standard of proof at the application phase than that used during a final adjudication of rights.

¶36 Although at first blush it appears that this procedure unjustly favors new appropriations and new uses to the detriment of vested rights, the procedure actually provides a balance between the two policy goals of putting water to the most beneficial use possible while simultaneously guarding vested rights. The procedure accomplishes this by placing a fairly low burden on a party seeking approval of a change application,

thereby allowing the party to attempt to perfect the right to use the water in the manner contemplated by the application. If such use can be accomplished without interfering with vested rights, the policy of putting water to the best use possible is furthered without causing injury to anyone. See Linke, 239 P.2d at 191 ("[W]e cannot turn a deaf ear to every request which reasonably appears designed for a more beneficial use of water not impairing vested rights by saying, as the Engineer in his decision did, that the proposed change 'could interfere substantially with the vested rights of others.'"); Dist. Court, 238 P.2d at 1137 ("[T]he law provides a period of experimentation during which ways and means may be sought to make beneficial use of more water under the application before the rights of the parties are finally adjudicated.").

¶37 In other words, during the application process, the court system serves to ensure that applicants who successfully establish reason to believe that a proposed water use can be accomplished without impairment of vested rights are given the opportunity to prove it. Determining whether an applicant has, in fact, proven that the new manner of use does not impair vested rights is a matter ultimately left to a final judicial determination of rights. We note, however, that the courts are fully empowered to protect vested rights from impairment throughout the perfection process. It is for this reason that we have previously stated that, after a change application has been approved, an applicant can only proceed absent "injury to [prior] rights if he hopes to perfect a right and be immune from liability. Legally, no one can be hurt by the procedure established by the Legislature. At the same time, however, it permits the development of our water resources to the utmost." Eardley, 77 P.2d at 376-77.

¶38 By establishing this system, the legislature gave practical effect to its determination that the possible benefits to be derived from a liberal policy toward application approval outweigh the potential of possible temporary harm if a use proposed in an application results in an impairment of vested rights. The value of allowing experimentation cannot be understated. As we stated in District Court, 238 P.2d at 1137,

> [i]f we were to finally adjudicate applicant's right to change or to appropriate water at the time that such application was rejected or approved, he would get only such rights as he could establish by a preponderance of the evidence that he could use beneficially without interfering with the

> rights of others and in such hearing he would not have the benefit of any opportunity to experiment and demonstrate what he could do. Such a system would cut off the possibility of establishing many valuable rights without a chance to demonstrate what could be done.

Our pronouncement in District Court nicely illustrates the danger of moving the preponderance burden, applicable when making a final determination of rights, to the preliminary application phase.

¶39 Pursuing a policy that allows experimentation with water use is not antithetical to a strong and legitimate desire to protect the vested rights of other water users. The procedures in place do not allow experimentation simply for the sake of experimentation, and they certainly do not allow the vested rights of other water users to be impaired by new use. See Piute Reservoir, 367 P.2d at 856 ("[W]hile we approved the application, we definitely held that the change should not be allowed to operate without affirmative proof that the rights of lower water users . . . were not thereby impaired."); Eardley, 77 P.2d at 376 ("Filing the application does not give the applicant the right or license to proceed to the injury of prior rights. He can proceed only upon an absence of injury to such rights if he hopes to perfect a right and be immune from liability."). Given that application approval is only a preliminary step in the perfection process and that the courts will remain open to water users whose rights face impairment, the possibility of a water user with vested rights suffering an irreparable injury due to the approval of a change application is limited.

¶40 Further, we note that before a change applicant's proposed use can be finally perfected and a certificate recognizing the validity of the change issued, the applicant is obligated to supply affirmative proof that no harm is being caused to the possessors of prior rights by the applicant's use. See, e.g., Eardley, 77 P.2d at 365-66 ("In his final proof [for a certificate of appropriation], the applicant is required to show the nature and extent of the works he has constructed, the quantity of water appropriated, and the application thereof to a beneficial use. Whether the water so appropriated is subject to being appropriated and can be taken for the use contemplated without injury to the owners of prior rights is necessarily involved in making final proof and must of necessity be determined by the state engineer from the proof submitted.").

¶41 Thus, after a change applicant has completed any necessary improvements and has commenced diverting water and putting that water to beneficial use, the applicant must eventually prove to the state engineer that the use in question in no way impairs prior rights. In making such proof, the change applicant carries the burden and must convince the state engineer by a preponderance of the evidence that other water users are not harmed by the change. See Piute Reservoir & Irr. Co. v. W. Panguitch Irr. & Reservoir Co., 364 P.2d 113, 116 (Utah 1961) ("[I]n proving its claim under this application to the State Engineer to obtain a certificate of such change or to a court where the rights established under such application may be litigated, applicant must show more than that there is reason to believe that the change does not impair established vested rights of the protestants. It must support a decision in its favor on this question by substantial evidence, and it has the burden of convincing the trier of the facts by a preponderance of all of the evidence that such change does not impair the vested rights of the protesting lower water users." (footnote omitted)), reh'g granted, Piute Reservoir, 367 P.2d 855.

¶42 We recognize that a change applicant assumes a substantial risk by investing time and money in an effort to perfect a proposed change in use that may later be disallowed by the state engineer or a court. This risk allocation is, however, in accord with the balance struck between the competing policies of encouraging experimentation with water use on one hand and of guarding the vested rights of this state's water users on the other. It is the change applicant who seeks to reap the benefit of the change in water use, and it is the applicant who must bear the risk that the proposed use, once initiated, may run afoul of prior rights. In this way, the law properly forces the change applicant to assess risks and rewards, and to demonstrate confidence in the propriety of a proposed use by financing its commencement.

¶43 We also recognize that the experimentation period is most effective when the effects of any change in use can be easily observed and calculated. When a change applicant is confronted with a situation in which the experimentation period is unlikely to provide evidence beyond that known at the time a change application is initially filed, it may be wise for that applicant to seek a declaratory judgment under the more demanding preponderance of the evidence standard before expending resources to effectuate the proposed use. Cf. Whitmore, 154 P.2d at 751 (allowing a change applicant to pursue a declaratory action as to the priority of certain rights even though the applicant's proposed change had yet to be perfected).

¶44 Having concluded that the reason to believe standard governs the change application process and that a preponderance standard is reserved for a final adjudication of rights, it is apparent that we must remand to enable the district court to consider the evidence with the proper standard in mind. To aid the district court in this process, we now provide content to the reason to believe standard and will then address the parties' arguments relative to the appropriate allocation of the burden of proof before turning to our final inquiry: whether a protestant can block application approval through the use of circumstantial evidence that establishes a probability that impairment will result if the change application is approved.

B. The Reason to Believe Standard

¶45 Although our case law has clearly established that a change applicant is required to show reason to believe that application approval will not result in impairment of vested rights, the content of that standard remains less than clear. The Searles argue on appeal that a protestant seeking to defeat application approval can only succeed by producing direct evidence of actual impairment. In the Searles' view, evidence of "likely" impairment--regardless of how likely that impairment is--will always be insufficient to defeat application approval.

¶46 In his dissent in Crafts, Justice Oaks endorsed a view similar to that advanced by the Searles, opining that "[a] change application should only be denied when, after resolving all contradictions in favor of the proponent of change, the evidence offered is so deficient that it provides no reason to believe that the proposed change could be made without impairing rights." 667 P.2d at 1083 (Oaks, J., dissenting). Although we concur, as did the Crafts majority, with Justice Oaks's understanding that the preliminary nature of the application process counsels in favor of placing a burden on applicants that is not unduly onerous, we disagree with Justice Oaks's conception of that standard.

¶47 Adopting such a low quantum of proof would turn the state engineer into nothing more than a rubber stamp, approving every change application submitted. As mentioned above, the procedures put in place by the legislature do not allow experimentation simply for the sake of experimentation. To adequately serve its purpose, the application process must provide some meaningful barrier so that the floodgates remain closed to all applications except those with a sufficient probability of successful perfection.

¶48 With that concern in mind, we conclude that the reason to believe standard is best understood as falling between the preponderance standard applicable in final adjudications and Justice Oaks's conception of the reason to believe standard as the lowest of hurdles. Specifically, we reassert the validity of our prior, admittedly opaque pronouncements, and now clarify that a change applicant's burden is satisfied if there is sufficient evidence to support a reasonable belief that the changes outlined in the application can be perfected without impairing vested rights. In other words, to gain application approval, a change applicant must convince the decisionmaker that there is reason to believe that the use proposed in the application can be undertaken without impairing vested rights. However, before application approval is warranted, it must be clear that the decisionmaker's determination that there is reason to believe is grounded in evidence sufficient to make that belief reasonable. Cf. State v. Clark, 2001 UT 9, ¶ 16, 20 P.3d 300 (establishing a "reasonable belief" standard for use in criminal probable cause determinations and providing that at "the preliminary hearing stages, the prosecution must present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it"). Just as the probable cause standard applicable to preliminary hearings in criminal cases serves the primary purpose of "ferreting out . . . groundless and improvident prosecutions," State v. Anderson, 612 P.2d 778, 783 (Utah 1980), so does the reason to believe standard serve to stem the flow of proposed changes in water use by arresting any proposal not supported by a reasonable belief that the change can be accomplished without impairing vested rights.

¶49 This standard is both workable and consistent with our prior cases that have analogized the reason to believe standard to the probable cause standard applicable during the preliminary phase of a criminal trial. See, e.g., Crafts, 667 P.2d at 1082 (Oaks, J., dissenting) (stating that the reason to believe standard "is the practical equivalent of a probable cause determination in a criminal case"); Dist. Court, 238 P.2d at 1135 ("[The court] must determine from the evidence whether there is probable cause to believe . . . that such water can be diverted . . without injury to or conflict with prior rights.").

¶50 Having articulated the proper conception of the reason to believe standard, we now address the appropriate allocation of the burden of proof before addressing the Searles' contention that a reason to believe showing can only be undermined by direct evidence of actual impairment.

III. THE BURDEN OF PROOF

¶51 Both the Searles and Milburn argue that after a change applicant makes a prima facie showing that no impairment will result from application approval, the burden of persuasion to show impairment shifts to the party protesting the application. The State Engineer argues that the burden of persuasion should remain on the change applicant at all times during the application process. We agree with the State Engineer that there is no shift in the burden of persuasion.[3]

¶52 As an initial matter, we note that there are sound policy reasons for placing the burden of persuasion squarely on the change applicant. As we acknowledged in Tanner v. Humphreys,

> "[i]f the change is made, it disturbs the existing order . . . and causes a modification to be made in the general adjudication decree. It is fitting that a party who asks such relief should bear the burden of proving that the vested rights of others will not thereby be infringed if it is granted. It is only the burden which is usually imposed upon the moving party in a lawsuit."

48 P.2d 484, 488 (Utah 1935) (quoting New Cache La Poudre Irr. Co. v. Water Supply & Storage Co., 111 P. 610, 611 (Colo. 1910) and citing Monte Vista Canal Co. v. Centennial Irr. Ditch Co., 135 P. 981 (Colo. Ct. App. 1913)).

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[3] The terminology covering evidentiary burdens is highly confusing, as various courts and commentators have used prevalent terms in different ways. Generally speaking, there are two evidentiary burdens: a burden of persuasion and a burden of production. See Koesling v. Basamakis, 539 P.2d 1043, 1046 (Utah 1975). "Burden of persuasion" refers to "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." Black's Law Dictionary 190 (7th ed. 1999). "Burden of production" refers to "[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling." Id. Finally, "burden of proof" is a catch-all term that encompasses both the burden of persuasion and the burden of production and generally refers to "[a] party's duty to prove a disputed assertion or charge." Id. In the present case, the parties assign error only to the district court's allocation of the burden of persuasion.

¶53 We recognize that language from our previous cases can be read as contemplating some sort of formal shift in the burden of persuasion. However, that language is better understood as an acknowledgment of the reality that once an applicant has produced sufficient evidence to persuade the decisionmaker that there is reason to believe that no vested rights will be impaired by application approval, a protestant will fail if evidence is not introduced that undermines the applicant's proof. Perhaps the present confusion has been caused by our use of the phrase "prima facie showing" to describe the amount of evidence that a change applicant must put forward when seeking application approval. See Edward L. Kimball & Ronald N. Boyce, Utah Evidence Law 3-8 (1996) ("'Prima facie evidence' is an ambiguous phrase."). Generally speaking, a prima facie showing is made by successfully producing enough evidence to survive a motion to dismiss and to send the matter to the jury. See Johnson v. Bell, 666 P.2d 308, 311 (Utah 1983). However, we have noted that the general concept of a "prima facie showing" operates differently when there is no jury. See id. In Johnson, we explained that "[t]o apply the jury trial practice [applicable to prima facie showings] in non-jury proceedings would be to erect a requirement compelling a defendant to put on his case . . . if the plaintiff had, according to jury trial concepts, made 'a case for the jury,'" even if the judge had already concluded that the plaintiff ought not to prevail. Id. (internal quotation omitted).

¶54 In keeping with this distinction, we have, in the context of the change application process, used the phrase "prima facie showing" to denote the amount of evidence that would be sufficient to warrant application approval absent the presentation of additional evidence undermining confidence in an applicant's proof that no impairment of vested rights will result from the use proposed in the application. Cf. Godesky v. Provo City Corp., 690 P.2d 541, 547 (Utah 1984) ("Prima facie evidence means only that quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence." (internal quotation omitted)).

¶55 In the final calculation, a change applicant will be entitled to application approval only if the decisionmaker is persuaded that there is no reason to believe that vested rights will be impaired if the application is approved. To successfully persuade the decisionmaker, an applicant must produce evidence sufficient to support a reasonable belief that no impairment will result from application approval. As a result, there may be situations in which even an unopposed change application is not approved because the applicant has failed to adequately persuade the decisionmaker that there is reason to believe that no harm

will result from approval. However, any party protesting a change application is certainly entitled to present evidence in an effort to convince the decisionmaker that application approval is not warranted under the circumstances.

¶56 Having clarified that the burden of persuasion remains on the change applicant throughout the application process, we next address the Searles' contention that a reason to believe showing can only be undermined by direct evidence of actual impairment.

IV. A CHANGE APPLICATION CAN BE DEFEATED THROUGH THE USE OF CIRCUMSTANTIAL EVIDENCE

¶57 While producing evidence sufficient to block approval of a change application is no doubt a difficult task for a protestant, illustrating impairment by means not reliant on conjecture or probability would, in many cases, be an impossible task. Determinations of whether impairment would result from application approval often hinge on probabilities. As we pointed out in Crafts v. Hansen,

> [t]he future impact of changes in allocation and use of water resources in a large geographical area is not generally susceptible of direct observation, measurement and calculation. Great reliance must be placed upon expert judgment based on professional knowledge and training, familiarity with the geography, and as much accurate data as can be acquired in the process of making future projections. . . . [W]e are not dealing so much with "facts" . . . as with the opinion of experts about the accuracy and legitimacy of the projections based upon the available facts.

667 P.2d 1068, 1081 (Utah 1983). Consequently, we cannot say that circumstantial evidence showing a possibility of impairment is, in all cases, insufficient to justify denying an application.

¶58 If the evidence produced by a protestant is compelling enough to undermine the reasonableness of the assertion that the proposed change will not impair vested rights, the state engineer should reject the application seeking to effect that change. We can envision situations in which circumstantial evidence could undermine an applicant's evidence to such an extent that it would be unreasonable to believe that the proposed change can be

accomplished without impairing vested rights. Consequently, we decline to exclude circumstantial evidence from being weighed when a decision as to application approval must be made.

CONCLUSION

¶59 We conclude that the district court invoked the wrong standard of proof and improperly allocated the burden of proof in undertaking its review of the State Engineer's denial of the Searles' change application. A change applicant is required only to show reason to believe that the proposed use can be undertaken without impairing vested rights in order for the application to warrant approval. The burden of persuasion remains on the applicant throughout the application process, although the protestant has the opportunity to provide evidence undermining the applicant's reason to believe showing. In producing such evidence, a protestant may rely exclusively on circumstantial evidence. Whether such evidence is sufficient to compel the denial of an application will depend on the unique facts of each case. Accordingly, we remand this case to the district court for reconsideration under the standard outlined in this opinion.

¶60 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.